COPY

71-1648

FILED
JUN 19 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No.

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, Justice of The Illinois Supreme Court; et al; as Members of THE ILLINOIS COURTS COMMISSION; WILLIAM J. SCOTT, Attorney General of Illinois, Individually and as designated Counsel for the ILLINOIS COURTS COMMISSION; ROY O. GULLEY, Administrator of the ILLINOIS COURTS, Individually and as Permanent Secretary of THE ILLINOIS COURTS COMMISSION; and JOHN W. LEWIS, JR., as Secretary of State of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

June 19, 1972.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX TO PETITION FOR CERTIORARI.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
1. The Right to Hold Office—Illinois' Constitutional Scheme	4
2. The Case	5
Reasons for Granting the Writ	8
1.	
A. State judicial status may not be conditioned on the waiver of federal constitutional rights and the decision below contradicts Bond v. Floyd, 385 U. S. 116	9
B. A State may not inflict a criminal penalty upon the federal constitutional right of silence and the decision below contradicts Boyd v. United States, 116 U. S. 616, Malloy v. Hogan, 378 U. S. 1, and Gardner v. Broderick, 392 U. S. 273	11
C. A State's judiciary may not inflict criminal penalties on judges just for the appearance of impropriety, or enter decrees of Attainer and Ex Post Facto Judgments, and the decision below contradicts Bouie v. Columbia, 378 U. S. 347, Giaccio v. Pennsylvania, 382 U. S. 339 and Slochower v. Board of Education of N. Y., 350 U. S. 551	14
2.	
A. The imposition of a penalty for the appearance of impropriety constitutes adjudication under mere appearance of justice	19

B. Judicial self-discipline under the guise of judicial process violates the "Ancient tenet of Anglo-American justice that 'No man shall be a judge in his own cause'." 21

C. Judicial self-discipline under such abstract and meaningless standards as impropriety or the appearance of impropriety will react adversely upon the independence of the judiciary and on First Amendment freedoms 21

Conclusion 23

INDEX OF CITATIONS.

Cases.

Bond v. Floyd, 385 U. S. 116 10

Boyd v. U. S., 116 U. S. 616 ..... 11, 13

Bouie v. Columbia, 378 U. S. 347 ..... 16, 17

Cole v. Richardson, ... U. S. ..... (40 L. W. 4384) ... 23

Cummings v. Missouri, 4 Wall 277 16

Ex Parte Garland, 4 Wall 333 16

Frost Trucking Co. v. Railroad Comm., 271 U. S. 583 .. 10

Gardner v. Broderick, 392 U. S. 273 ..... 11, 13, 14

Garrity v. New Jersey, 385 U. S. 473 ..... 11, 14

Giaccio v. Pennsylvania, 382 U. S. 339 17

Gomillion v. Lightfoot, 364 U. S. 339 10

Gregoire v. Biddle, 177 F. 2d 579 (Cir. 2, 1949) 11

Holland, In re, 377 Ill. 346, 36 N. E. 2d 543 15

Kastigar v. U. S., ... U. S. ..... (40 L. W. 4554) 11

Larsen, In re, 86 A. 2d 430 (H. J., 1952) 21

Livingstone v. Ogilvie, 43 Ill. 2d 9, 250 N. E. 2d 138 ... 4, 5

Malloy v. Hogan, 378 U. S. 1 ..... 9, 11, 13
Napolitano v. Ward, 317 F. Supp. 83 (N. D. Ill. E. D.) ..... passim
Napolitano v. Ward, ... F. 2d ..... (7 Cir. 1972) .. passim
People ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 N. E. 2d 168 ..... 5, 13, 16
Prentis v. Atlantic Coast Line Co., 211 U. S. 210 20
Slochower v. Board of Educ. of N. Y., 350 U. S. 551 .. 18, 19
Snowden v. Hughes, 321 U. S. 1 .....
Ullmann v. U. S., 350 U. S. 422 ..... 11, 12
U. S. v. Johnson, 383 U. S. 169 11
U. S. v. Lovett, 328 U. S. 303 16

Constitutions and Statutes.

United States Constitution:
Amendment V 3
Amendment XIV 3
United States Code:
28 U. S. C. § 1254(1) 2
28 U. S. C. §§ 1343, 2201, 2202 2
42 U. S. C. § 1983 2
Constitution of Illinois:
Article IV, Sections 4 and 24 ..... 5, 15
Article V, Section 5 5
Article VI, Sections 15 and 18 ..... 3, 4, 15
Illinois Revised Statute, Chap. 38 §§ 106-1 et seq. 6, 7

Books, Articles and Law Reviews.

Dickler, "Man on Trial" (N. Y. 1962) page 7.....21, 22

Levy, "Origins of the Fifth Amendment" (Oxford Press, N. Y., 1968) page 15..... 13

55 A. B. A. J. (1969) 20

36 Univ. of Chicago, Law Review, 665.....19, 20

Index to Appendix.

Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit [Napolitano v. Ward, ... F. 2d ..... (7 Cir. 1972)].....A1 to A8

Appendix B—Memorandum Opinion and Order [Napolitano v. Ward, 317 F. Supp. 83 (N. D., Ill., E. D., 1970)] .....A9 to A13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. .....

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, Justice of The Illinois Supreme Court; et al; as Members of THE ILLINOIS COURTS COMMISSION; WILLIAM J. SCOTT, Attorney General of Illinois, Individually and as designated Counsel for the ILLINOIS COURTS COMMISSION; ROY O. GULLEY, Administrator of the ILLINOIS COURTS, Individually and as Permanent Secretary of THE ILLINOIS COURTS COMMISSION; and JOHN W. LEWIS, JR., as Secretary of State of Illinois,

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The Petitioner, Richard A. Napolitano, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on March 21, 1972.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, is Appendix A hereto. The relevant opinion of the District Court is reported as *Napolitano* v. *Ward*, 317 F.Supp. 83 (N.D. Ill., E.D., 1970) and is Appendix B hereto.

JURISDICTION.

This action was instituted under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1343, 2201, 2202 and claimed a deprivation of Petitioner's rights under the Self-Incrimination and Due Process Clauses of the Fourteenth Amendment and that Respondents acted under color of Illinois law.

The judgment of the Court of Appeals was entered on March 21, 1972. No petition for rehearing was filed and this petition for writ of certiorari is filed on or before June 19, 1972.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1.

Does Petitioner's removal, as a Circuit Judge of Cook County, Illinois, because he refused to waive his right against self-incrimination, when called to testify before a Grand Jury investigating his personal behavior, violate his rights under the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments?

2.

Where the punishment is a penalty prescribed for criminal conviction, and "appearance of impropriety" consti-

tutes the standard applied to criminally innocent personal conduct and to the refusal to waive the constitutional right against self-incrimination before a grand jury: Is the proceeding and the forfeiture of Petitioner's State judicial office repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

UNITED STATES CONSTITUTION, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . .

UNITED STATES CONSTITUTION, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 4 OF ARTICLE IV, CONSTITUTION OF ILLINOIS:

> § 4 No person who has been, or hereafter shall be convicted of bribery, perjury or other infamous crime . . . shall be eligible to the General Assembly, or to any office of profit or trust in this State.

SECTION 18 OF ARTICLE VI, CONSTITUTION OF ILLINOIS:

> § 18 . . . any judge may be retired for disability or suspended without pay or removed for cause by a commission composed of one judge of the Supreme Court selected by that Court, two judges of the Appellate Court selected by that Court, and two circuit judges selected by the Supreme Court. Such commission shall be convened by the Chief Justice upon order of the Supreme Court or at the request of the Senate.

CANON No. 4, CANONS OF JUDICIAL ETHICS:

> A Judge's *official*[1] conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everdyday life, should be beyond reproach.

STATEMENT OF THE CASE.

The Petitioner was duly elected a Judge of the Circuit Court of Cook County, Illinois, in November 1968 and was removed from that office "for cause" on July 14, 1970. The "cause" was a violation of Canon 4 of the Canons of Judicial Ethics which provides: "A Judge's . . . conduct should be free from . . . the appearance of impropriety . . . and his personal behavior . . . in his everyday life should be beyond reproach." [*supra*].

Section 18 of Article VI of the Constitution of Illinois empowers the Respondents to remove any judge "for cause". The Respondents are the five judges constituting the Illinois Courts Commission, its permanent secretary and the Attorney General designated by the Commission to formally charge and prosecute the Petitioner.

1.

The Right to Hold Office—Illinois Constitutional Scheme.

In Illinois "the right to hold office is a valuable one and its exercise should not be declared prohibited or curtailed except by plain provisions of the law", which "should be construed in favor of eligibility." [*Livingstone* v. *Ogilvie*,

1. Footnote 3 to the opinion of the Court of Appeals sets out Canon 4 but apparently overlooked the word "official". The omission is constitutionally immaterial.

43 Ill.2d 9, 17, 250 N.E.2d 138]. "No person shall be eligible for the office of judge unless he shall be a citizen and licensed attorney-at-law of this State, and a resident of the judicial district, circuit, county or unit from which selected." [ARTICLE VI, SECTION 15, CONSTITUTION OF ILLINOIS]. Section 4 of Article IV (Conviction of a Crime), Section 24 of Article IV (Impeachment) and Section 5 of Article V (Executive Officers— Ineligibility For Other Office During Tenure) are the sum total of the "ineligibility provisions" of the Illinois Constitution. [*Livingstone* v. *Ogilvie*, 43 Ill.2d at 15, 250 N.E.2d 138].

The Petitioner is fully eligible and qualified as a Judge of the Circuit Court of Cook County.

2.

The Case.

This case arises out of a five month Grand Jury investigation of the Illinois State Fair. On January 30, 1970 the Grand Jury returned indictments charging the offense of conspiracy with regard to State Fair concession contracts. The Petitioner was named as one of the conspirators.

Section 4 of Article IV of the Illinois Constitution required his office to be forfeited if and when the presumption of his innocence is removed by criminal conviction in a trial court. [*People ex rel. Keenan* v. *McGuane*, 13 Ill.2d 520, 537; 150 N.E.2d 168]. But on June 12, 1970 that possibility was precluded when the Circuit Court of Sangamon County ruled that the indictments failed to state a crime and entered judgment on behalf of the criminal defendants.

One could reasonably surmise that that would have been the end of it! But it wasn't!

Petitioner's office was forfeited on July 14, 1970, because his criminally innocent State Fair conduct had been com-

plicated by the Self-Incrimination Clause of the Constitution in tandem with the "Appearance of Impropriety" Clause of the Canons of Judicial Ethics. [Canon 4, *ante*, p. 4].

Judge Napolitano was not indicted on January 30, 1970. He was merely named as a non-indicted co-conspirator. When he was subpoenaed by the Grand Jury, he had claimed his constitutional right of silence, was granted statutory immunity [Ill. Rev. Stat., Chap. 38 §§ 106-1, et seq.] and compelled to testify about the State Fair matters.

February 5, 1970, Respondents received a letter from the Chicago Bar Association, which, in relevant part, stated:

> The Board of Managers of the Association took note at its meeting today of the report that Circuit Judge Richard A. Napolitano invoked the Fifth Amendment when called upon to testify in a Grand Jury investigation in Sangamon County.
>
> While this action by Judge Napolitano may be entirely within his constitutional rights, it is quite evident that such action will not contribute to public confidence in the judiciary and that it is particularly unfortunate at a time when the respect for our judicial system seems to be at a low ebb.[2]

• • • • •

Petitioner was suspended and Respondents' disciplinary powers were invoked "In the matter of Judge Richard A. Napolitano's conduct in his invocation of the privilege against self-incrimination before the Sangamon County Grand Jury."[3]

The Attorney General was designated and he filed a formal complaint on March 19, 1970. It charged appear-

2. The parties agree the facts are not in dispute. Thus, the references to the record are omitted and at this juncture, references to the "Statement of Fact" — Appellant's Brief [(7 Cir.), page 11].

3. Appellant's Brief (7 Cir.) [page 13].

ance of impropriety in violation of Canon 4, [*ante*, p. 4] and alleged the following as constituting conduct unbecoming of a judge:

> 1. That on or about September 1, 1969, the Sangamon County Grand Jury commenced an inquiry into possible wrongdoing in connection with the Illinois State Fair, which inquiry eventuated on January 30, 1970, in the filing of indictments numbers 317-70 and 320-70 alleging official misconduct in connection with the 1968 and 1969 State Fairs. These indictments allege the participation of respondent in said misconduct, though respondent is not named as a defendant therein.
>
> 2. That on or about January 29, 1970, the respondent appeared as a witness before the September Grand Jury, Sangamon County, Illinois, and in response to inquiries directed to him before said jury, the respondent invoked his constitutional privilege against self-incrimination in support of his refusal to answer questions concerning the Illinois State Fair, and any possible wrongdoing on his part in connection therewith.
>
> 3. That respondent, accompanied by and speaking through counsel, appeared before the Honorable William H. Chamberlain, Judge of the Circuit Court of Sangamon County, on January 29, 1970, and in open court stated that he had invoked his constitutional privilege against self-incrimination in connection with the Grand Jury inquiry into the Illinois State Fair and his possible wrongdoing in connection therewith. Upon motion of the State's Attorney of Sangamon County, Richard A. Hollis, and without objection, respondent was granted immunity by the court in accord with the provisions of Article 106, Chapter 38, Illinois Revised Statutes, and on information and belief, testified at length before the said Grand Jury thereafter.[4]

On July 14, 1970, Respondents ordered Petitioner removed from office because of the "appearance of impro-

4. Appellant's Brief (7. Cir.) [page 15].

priety" in violation of Canon 4 [*ante*, p. 4]. The Courts Commission findings follow the paragraphs of the foregoing complaint.

Petitioner had previously requested injunctive relief restraining all further disciplinary proceedings which the District Court denied on July 2, 1970. The federal claim is and has been that the foregoing complaint violates Petitioner's rights under the Fifth and Fourteenth Amendments in that it is based "on the fact that he invoked the privilege against self-incrimination when called to testify before a Sangamon County grand jury". The District Court declared that "the spectacle of a judge invoking the Fifth Amendment is not a pretty one" [317 F. Supp. at 85 (App. 11)], dismissed the complaint with prejudice and entered judgment in favor of Respondents.

The judgment of the District Court was affirmed by the Court of Appeals, who held, in short, as follows: that a State is not constitutionally required to allow a judge to remain in office [*Snowden* v. *Hughes*, 321 U.S. 1]; that Canon 4 of the Canons of Judicial Ethics, which forbids personal behavior constituting the appearance of impropriety, imposes a constitutionally permissible condition on the right to hold State judicial office; and thus, a judge who exercises his right against self-incrimination under circumstances constituting the appearance of criminality may be removed from office [App. 7 through 8].

REASONS FOR GRANTING THE WRIT.

The questions presented raise substantial issues concerning the imposition of ethical norms on public officials and whether mandatory canons of ethics can be enforced under concepts consistent with "Justice Under Law".

1.

The Decisions and Opinions Below Conflict with the Decisions of the Supreme Court of the United States.

A.

In reliance upon what it conceived to be the principles established by *Snowden* v. *Hughes*, 321 U.S. 1, the Seventh Circuit has here held that "impropriety" or "appearance of impropriety" within the meaning of Canon 4 of the Canons of Judicial Ethics, imposes a constitutionally permissible condition on the right to hold Illinois judicial office and that a person who exercises his constitutional right of silence while a member of the judiciary may be removed from office. [See *ante*, p. 9]. Realistically and analytically this means that a judge is excepted from the constitutional mandate that "no person shall be compelled in any criminal case to be a witness against himself". And this means that a judge does not enjoy the constitutional "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy* v. *Hogan*, 378 U.S. at 8.

In so holding, the Seventh Circuit has virtually emasculated the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments and in the process, overruled all relevant decisions by this Court which construe and apply them.

At bottom, of the rejections of Petitioner's constitutional claims below, is the proposition that "a state is not required to allow a judge to occupy a state judicial office" because "the privilege is one granted by a state, not a right secured by constitutional mandate." *Napolitano* v. *Ward* ..... F. 2d ..... (7 Cir., App. 7).

Long, long ago this Court said that no government may

"impose conditions which require the relinquishment of constitutional rights". *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 594. Because; as the *Frost* case declares: "If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all" and it is "inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." See and compare: *Gomillion* v. *Lightfoot*, 364 U.S. 339.

Petitioner's claim transcends the mere assertion of an abstract right to be a Judge of the Circuit Court of Cook County. His claim is that the Respondents have exploited their state power over his "privilege of occupying such an office" and thereby denied him the full enjoyment of rights specifically secured to him under the Fifth and Fourteenth Amendments to the Federal Constitution. The question here is identical to that in *Bond* v. *Floyd*, 385 U.S. 116; "whether the Georgia House of Representatives may constitutionally exclude . . . Bond, a duly elected Representative from membership because of his statements, and statements to which he subscribed." [385 U.S. at 118.] The Court held: "that the disqualification of Bond from membership in the Georgia House because of his statements violated Bond's right of free expression under the First Amendment." [385 U.S. 137.] The District Court there "reasoned that Bond's right to dissent as a private citizen was limited to his decision to seek membership in the Georgia House." [385 U.S. at 127.] And here, the District Court reasoned that "the spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law" and thus, his "reluctance to aid in a grand jury investigation of (his) suspected criminal

activity" while a member of the judiciary constitutes disqualification for his judicial office.[5] [App. 11.]

B.

Moreover, the opinions and decisions below contradict *Boyd* v. *United States*, 116 U.S. 616; *Malloy* v. *Hogan*, 378 U.S. 1; *Gardner* v. *Broderick*, 392 U.S. 273 and their progeny. And with regard to their destructive impact on the future free will of other judges who may be chosen as the penal object of an inquiry in quest of the crime they defeat the principles of *Garrity* v. *New Jersey*, 385 U.S. 473.

Boyd v. *United States*, holds that the sole concern of the privilege "is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal act'."[6] In the *Malloy* case, the privilege is declared as the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U.S. at 8. And in *Gardner* v. *Broderick*, the question was "whether a State may discharge an officer for refusing to waive a right which the Constitution guarantees to him;"—the Court held that "the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." 392 U.S. at 277, 279.

---

5. The paradox emerges when a judge considers that his constitutional right is limited only when his official conduct is not being investigated. A judge, like legislator and executive, is under mandatory and absolute immunity when the inquiry—civil or criminal—concerns official conduct. See e.g. *Gregoire* v. *Biddle*, 177 F.2d 579 (2d Cir., 1949); *United States* v. *Johnson*, 383 U.S. 169 (affirming 337 F.2d 180).

6. As stated in *Kastigar* v. *United States*, ... U.S. ...., 40 U.S.L.W. at 4554, quoting *Ullmann* v. *United States*, 350 U.S. 422, 438-439, quoting *Boyd* v. *United States*, 116 U.S. at 634.

By these standards the judgments below cannot stand scrutiny. The determination that while "the state may not draw an inference of guilt from (a judge's) exercise of his constitutional right of silence, it may rightfully be dismayed at the lack of candor and cooperation manifested thereby" [317 F.Supp. at 85 (App. 11)] is an affront to logic. And the conclusion that "the spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law" [*ibid.*] is "to view a particular provision of the Bill of Rights with disfavor" and to thus, "disrespect the Constitution." *Ullmann* v. *United States*, 350 U.S. at 428. The decision and the critical fact remains that Petitioner was brought to discipline because he "invoked the Fifth Amendment when called upon to testify in a Grand Jury investigation in Sangamon County" [See: *ante*, p. 6] and removed from office under the following circumstances:

1. As a non-indicted co-conspirator protected by the Illinois Immunity Act in exchange for his testimony concerning the conduct charged in the indictments.

2. After the conduct charged in the indictments was adjudicated innocent and after judgments were entered in favor of the indicted conspirators.

3. When the penalty inflicted was one affixed to the criminal conduct charged in the indictments and adjudicated innocent per paragraph 2, *supra*.

In sum, Petitioner was removed from office because he wasn't indicted and he wasn't indicted because he claimed his constitutional right of silence. Any contrary conclusion requires an assumption we cannot indulge. We will not presume that the Honorable Judges constituting the Illinois Courts Commission would have instituted forfeiture for the appearance of impropriety simply because

petitioner was charged by unfounded indictment and then acquitted on the face thereof. Professor Levy ["ORIGINS OF THE FIFTH AMENDMENT" (Oxford Press N.Y., 1968), page 15] declares that the Inquisitions were a natural outgrowth of what preceded, viz:

> Treating an accusation as a conviction,[7] when an accusation was little more than an expression of popular opinion, was a makeshift that fell so short of doing justice that it could not survive.

Unless the constitutional mandate that "no person shall be compelled in any criminal case . . ." lends itself conceptually or in practice to some hidden exception as to judges, the *Boyd, Malloy* and *Gardner* cases are offended by the opinions and judgments below.

For whatever the reason, the Seventh Circuit chose to emphasize the Appearance of Impropriety and Personal Behavior Above Reproach Clauses of Canon 4 of the Canons of Judicial Ethics. It emphasized that the Canon is predicated on the proposition that "both the personal and professional behavior of a judicial officer" is within the scope of official "conduct in the courtroom." [App. 7]. Unless this Court grants the writ, the decision of the Court of Appeals constitutes high federal authority that the A.B.A. Canons of Judicial Ethics may "subject a judicial officer to discipline or removal" should he claim his rights

---

7. Section 4 of Article IV of the Constitution of Illinois [See: *ante*, p. 3] was construed with regard to "conviction" [*People ex rel. Keenan* v. *McGuane*, 13 Ill.2d at 537] as follows:

> While neither the constitution nor the statutes effecting its purpose define the term "conviction," yet respect for the law and deference to the transcendent trust placed in public officials requires that such officer forfeit his office after the presumption of his innocence is disspelled by conviction of an infamous crime in a trial court. We conclude that the provisions of the Illinois constitution and statutes effecting a vacancy in public office upon the conviction of the incumbent of an infamous crime refer to the conviction in a trial court.

under the command that "no person shall be compelled in any criminal case to be a witness against himself".

Canon 4, as so construed and applied, operates precisely as the New York law declared invalid in *Gardner* v. *Broderick*, 392 U.S. at 279 and as the New Jersey statute whose thrust was held to constitute sufficient coercion to render a confession unlawful in *Garrity* v. *New Jersey*, 385 U.S. 473.

The thrust of Canon 4, as applied by the Illinois Courts Commission and as constitutionally approved by the Seventh Circuit, is to remove any constitutional impediment to self-incrimination when a member of the judiciary is under criminal investigation for any reason. The hapless judges who are among the future legions marked to aid a grand jury in quest of his crime have one of two alternatives: (1) waiver of his immunity and self-incrimination, or (2) forfeit his judicial office under the appearance of criminality.

If there be compelling reasons why members of the judiciary must be subjected to this kind of Hobson's choice, those reasons should be declared by no less than this Court. But, as things now stand, *Garrity* v. *New Jersey*, holds that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." 385 U.S. at 499.

C.

Prior to January 1970 Illinois had no statute prohibiting judges or other people from invoking the privilege against self-incrimination and Canon 4 of the Canons of Judicial Ethics had no known standing as an enforceable statute —

and nowhere had it been construed or used to supersede or suspend the Self-Incrimination and Due Process Clauses of the Federal Constitution. The only relevant decisional law was *In re Holland*, 377 Ill. 346; 36 N.E. 2d 543 (1941) which involved a disciplinary proceeding because the judge, when called before a grand jury investigating non-judicial conduct, refused to sign an "immunity waiver". His removal was before the Supreme Court of Illinois and the contention was "that since respondent is a judge his right to retain his license as a lawyer is subjected to additional or increased obligations to assist in the investigation conducted by the grand jury."[8] 36 N.E. 2d at 545. The Court discharged the rule and declared, *inter alia:* "The late Mr. Justice Cardozo in his Paradoxes on Legal Science, page 48, makes the statement that where government makes a declaration of right, such is "the admission by organized society that the claim is justified from the public point of view. That principle may be applied in a case of this kind. The right given by the constitution being legal, is as well a moral right, since the public point of view can scarcely be said to include that which is not moral." 36 N.E. 2d 547.

Thus, when Petitioner appeared before the Grand Jury the relevant Illinois law was:

1. Section 18 of Article VI of the State Constitution provided "any judge may be . . . removed for cause, and

2. Section 4 of Article IV of the State Constitution [*ante*, p. 3] provided that an officer is required to

8. This is precisely the standard applied by the District Court, [317 F.Supp. at 85 (App. 11)] viz:

> The spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law. Unwillingness to fulfill that duty, as shown by reluctance to aid in a grand jury investigation of suspected criminal activity, may properly be considered to be evidence of a disregard for this obligation.

forfeit his office "after the presumption of his innocence has been dispelled" by criminal conviction in the trial court. *People ex rel. Keenan* v. *McGuane,* 13 Ill. 2d at 537, 150 N.E. 2d 168.

Respondents' complaint, filed on March 19, 1970 [quoted, *ante,* p. 7] was to punish the exercise of the constitutional right of silence.

Without getting into the niceties of whether Respondents' proceeding was a legislative Bill of Attainder or a decree of Attainder and *post facto* judgment, the actual impact on Petitioner embodies the vices of vagueness, overbreadth, attainder and *post facto* infliction of punishment. Nothing could be clearer than the fact that the Petitioner was singled out and made the punitive object of a newly created offense — *post facto* — and summarily removed from office[9] under circumstances which the State Constitution prescribed as requiring proof beyond a reasonable doubt of every element necessary to constitute the crime charged. This is constitutionally prohibited and the proscription is so clearly plain that reference to Article, Amendment, Section or Clause is superfluous. But see e.g.: *Cummings* v. *Missouri,* 4 Wall 277; *Ex parte Garland,* 4 Wall 333; *United States* v. *Lovett,* 328 U.S. 303

In the judicial context, an *ex post facto* judgment or decree is prohibited under the Due Process Clause of the Fourteenth Amendment. *Bouie* v. *Columbia,* 378 U.S. 347, 355. As stated in *Bouie:* "When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person *to criminal liability for past conduct,* the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime"; thus, "if the result above stated were attained by an exercise of the State's legislative

9. Respondents' complaint [*ante,* p. 7] states historical fact which Petitioner could not and did not deny.

power, the transgression of the Due Process Clause of the Fourteenth Amendment would be obvious" and "the application is none the less clear when that result is accomplished by the state judiciary in the course of constructing an otherwise valid . . . state statute."

In essence, but under the guises of the appearance of impropriety, Petitioner was inflicted with a penalty which would have affixed had he been criminally convicted in a trial court. But his criminating course of conduct was not only constitutionally immune, it had been adjudicated non-criminal in the criminal proceeding itself. In *Giaccio* v. *Pennsylvania*, 382 U.S. 339, Mr. Justice Stewart (concurring) condemned a similar Pennsylvania result of imposing costs on a criminally acquitted defendant and declared "it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That I think, violates the most rudimentary concept of due process of law." 382 U.S. at 405. The Court took a narrower view and held: "It would be difficult if not impossible for a person to prepare a defense against such abstract charges as 'misconduct' or 'reprehensible conduct'. If used in a statute which imposed forfeitures, punishments or judgments for costs such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. * * * We hold that the 1860 Act is constitutionally invalid both as written and as explained by the . . . Courts." 382 U.S. at 404. Under either view, the use and application of Canon 4's "impropriety" or "appearance of impropriety" standard as constituting cause justifying Petitioner's removal from office cannot pass muster. And the decision below holding that such "general abstract" charges are a constitutionally permissible basis for the forfeiture are in direct conflict with this Court's holdings.

But, the root, the branch—the essence of this case is,

as stated by the Chicago Bar Association; "the report that Circuit Judge Richard A. Napolitano invoked the Fifth" and while "entirely within his constitutional rights . . . such action will not contribute to public confidence in the judiciary." By instinct, the cross-examiner would ask—Why? And, regardless of answer, proceed to develop the inquiry to its natural conclusion—that a judiciary which subjectively sees malevolence in a specific constitutional provision, is not very likely to apply it objectively when judging others.

Perhaps the most relevant due process case is *Slochower v. Board of Education of New York*, 350 U.S. 551. Professor Slochower was removed from State employment simply because he claimed the right of silence at a time and under circumstances when the right could not be constitutionally conditioned. The State contended that the mere exercise of the right constituted the appearance of guilt. The Court held that "since no inference of guilt was possible . . . the discharge falls of its own weight as wholly without support. There has not been the protection of the individual against arbitrary action which Mr. Justice Cardozo characterized 'as the very essence of due process'." 350 U.S. at 559. The Court reasoned: (1) "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent . . . to a confession of guilt" [350 U.S. at 557]; (2) "the classification of innocent and guilty together was arbitrary" [350 U.S. at 556]; and thus (3) "the discharge falls of its own weight as wholly without support."

The same premises are stronger here and thus, the conclusion of wholly arbitrary action is undeniable. Petitioner's removal must be tested by this logic: (1) his suspected conduct concerning State Fair contracts has been held criminally innocent in the court of criminal jurisdiction; (2) classification of the innocent and guilty to-

gether is arbitrary; and thus (3) the forfeiture must fall of its own weight and "there has not been the protection . . . against arbitrary action which Mr. Justice Cardozo characterized as the very essence of due process." [*supra*, at 559.]

These conflicts with the enumerated, and other, decisions of this Court justify the grant of certiorari to review the opinions and judgment below.

2.

The Decisions Below Raise Significant and Recurring Problems Concerning Efforts to Create and Control the Ethics of Judges and Other Public Officers.

A.

The opinions and decisions below reflect important and difficult considerations growing out of current efforts to impose enforceable ethic standards on governments rooted in the rule of law. This case presents that problem, it is timely and overripe for adjudication.

This case is not the only contemporary instance of a judicial vacancy under the lash of "appearance of impropriety". But it does so happen that this case presents the problem in a justiciable context—most such forfeitures occur by resignation. This is a substantial reason why the writ should be granted. "Almost every generation;" Professor Philip Kurland[10] asserts: "has raised the question . . . whether . . . judges are removable . . . for cause other than the commission of 'high crimes and misdemeanors'," yet, he says: "the issue has never been successfully framed for a definitive resolution by the Supreme Court." and thus "those who would bestow a monopoly of constitutional con-

10. Professor of Law, University of Chicago.

struction on the Court have had to face the problem without adequate judicial authority on which to rest argument."[11]

In 1969 the American Bar Journal rested an editorial on Canon 4 of the Canons of Judicial Ethics[12] and the Appearance of Impropriety Clause, speculating that "it was *the possible impropriety that appeared* in the conduct of Justice Fortas, rather than any wrongdoing" that caused the problem.[13]

The Seventh Circuit, the highest federal judicial authority in absence of action by this Court, now holds that "Canon 4 of the Judicial Canons of Ethics, is based upon the premise that both the personal and professional behavior of a judicial officer are relevant to his qualification" and "any violation . . . subject the judicial officer to discipline or removal." [App. 7]. The scope of the overbreadth of any such standard would be uncomprehensible but for what has happened to the Petitioner whose only crime, it seems, has been to insist upon the indignity of "adjudication" rather than the self-imposed infamy of resignation. *Tri-partite* and dual sovereigns notwithstanding, the strongest restraint on arbitrary power is our commitment to the rule of law. This is the restraint inherent in the nature of the judicial power, aptly defined by Justice Holmes as that which "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226.

The problem we perceive with the adjudication of apparent offenses is that its administration constitutes the

---

11. Kurland, THE CONSTITUTION AND THE TENURE OF FEDERAL JUDGES: SOME NOTES FROM HISTORY, 36 U. of Chgo. L. Rev. 665.

12. Canon 4 approved by the Seventh Circuit—the one here involved [*ante*, p. 4]—is Canon 4 of the A.B.A. Canons of 1924.

13. 55 ABAJ 648 (1969).

appearance of justice. Lady Justice without her blindfold is a stranger at the threshold where "Equal Justice Under Law" is engraved above.

B.

Yet, Petitioner has been branded by governmentally imposed infamy and a United States Court of Appeals has stamped it with the imprimatur of the Constitution of the United States. Justification in the name of ethics, or by the nature of the judicial office or in the name of public confidence are conclusions unsupported by the proofs—even more important, they are conclusions which must fall given the substance of "the ancient tenet of Anglo-American justice that 'No man shall be a judge in his own cause'." [*In re Larsen*, 86 A.2d 430, 435 (N.J., 1952) Brennan, J. concurring].

C.

The Seventh Circuit opinion and judgment presents a number of unanswered questions. For example:

1. What of First Amendment freedoms—as the vehicles by which appearances leading to penal sanction are created, does the instinct of self-protection and the exercise of judicial power constitute a future threat to their free exercise? There are unfortunate comparatives—The Sedition Laws are one.

2. Can it be said that the judiciary is less likely to judge as it is judged than other men might be?

In sum, the substantiality of the questions is the substance of the Constitution. The following excerpt from the Author's Preface "*Man on Trial*"[14] is relevant to the case at hand and why the writ should be granted.

---

14. Dickler, "*Man on Trial*" (Doubleday & Company, Inc., N.Y. 1962) page 7.

"The trials recorded in these pages have been selected for the imprint they left upon Western history, and the illumination they cast upon their own troubled times. Each represents a phenomenon seldom seen and generally unrecognized, which makes its appearance when society is at war with itself, when fresh ideas and new values are being born on the tangled bed of social upheaval.

In such periods of tension, the forces dominating the community display a remarkable propensity for resorting to the judicial process to relieve themselves of their ideological bellyaches. Assassination or lynching or some less drastic but equally expeditious disposition of the problem might well have served, without fear of retribution; yet in each instance judicial machinery is rolled ponderously into place (or invented if it does not exist), the ceremonials observed with due solemnity, often at unnecessary length, and if nothing goes amiss, the prevalent political or religious principle is suitably embalmed as truth.

In these cases, the trial may be seen as an aspect of mankind's dependence on ritual. Specifically, the ritual employed is that of expurgation—to rid the body politic of an irritant, an alien substance, or a poison. Without inviting odious comparison, it may be said that Stalin and Cromwell, for example, shared an instinctive need for judicial endorsement of their bloodlettings, although each held absolute sway in his realm. Ironically, in the eye of history these trials failed to cure the maladies for which they were prescribed."[15]

The Petitioner's personal plight should not be forgotten. The penalty imposed is governmentally inflicted infamy whose consequences are historically documented. The stain should be removed by declaration of the Supreme Court of the United States. In addition, Petitioner is entitled to

15. Included in the Index of Contents are these "Trials": Jesus, Salem Witchcraft Trials, Andrew Johnson, The Dreyfus Case, The Reichstag Fire Trial, The Moscow Trials, The Nuremberg Trial, The Oppenheimer Hearing.

restoration of his State and Federal Civil Rights including substantial back pay and pension benefits.[16] Petitioner has exhausted all other sources for judicial relief and thus, to be vindicated, he prays that this Court grant certiorari and plenary consideration.

Petitioner's plea is well beyond the hypothetical stages referred to, in a different context, by Mr. Chief Justice Burger [*Cole* v. *Richardson* ____ U.S. ____, 40 U.S.L.W. at 4384] as follows:

> Those who view the Massachusetts oath in terms of an endless 'parade of horribles' would do well to bear in mind that many of the hazards of human existence that can be imagined are circumscribed by the classic observation of Mr. Justice Holmes, when confronted with the prophecy of dire consequences of certain judicial action, that it would not occur 'while this Court sits.' *Panhandle Oil Co.* v. *Knox*, 277 U.S., at 233 (Holmes, J., dissenting).

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
309/676-0591,
Peoria, Illinois 61602,
Attorney for Petitioner.

16. Although it is overlooked by the Seventh Circuit's opinion, the March 26, 1971 District Court order dismissing the suit with prejudice also denied Petitioner his request for leave to amend.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term 1971 — January Session 1972

No. 71-1444

RICHARD A. NAPOLITANO,
Plaintiff-Appellant,

vs.

HON. DANIEL P. WARD, Justice of the Illinois Supreme Court, et al.
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-1597
JOSEPH SAM PERRY,
Judge.

March 21, 1972

Before DUFFY, *Senior Circuit Judge,* STEVENS, *Circuit Judge* and GRANT*, *District Judge.*

DUFFY, *Senior Circuit Judge.* This is an appeal from a judgment of the District Court dismissing plaintiff's amended complaint and his cause of action.[1]

The plaintiff-appellant was duly elected a Circuit Judge, Cook County, Illinois, in 1968. He was removed from office

*Chief District Judge Robert A. Grant of the Northern District of Indiana, is sitting by designation.

1. The District Court's findings and conclusions may be found in the Memorandum Opinion and Order as *Napolitano* v. *Ward,* 317 F. Supp. 83 (N.D.Ill., 1970).

"for cause" by the Illinois Courts Commission[2] on July 14, 1970.

The instant suit is based on the Civil Rights Act (42 U.S.C. § 1983) and 28 U.S.C. §§ 1343, 2201 and 2202. The defendants are the five judicial members of the Illinois Courts Commission, its secretary and the Attorney General of Illinois.

Plaintiff claims that his removal from the office of Circuit Judge, under color of Section 18 of Article VI of the Illinois Constitution and Rule 51, Rules of the Supreme Court of Illinois, deprived him of his rights under the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments, United States Constitution.

In September 1969, the Sangamon County, Illinois Grand Jury began an investigation into charges relating to the administration and management of the Illinois State Fair. Judge Napolitano was called as a witness by the Grand Jury. On advice of counsel, he refused to answer any questions as to his business dealings with the State Fair on the ground that any answers might tend to incriminate him.

Upon motion of the State's Attorney, Judge Napolitano was granted full transactional immunity in return for his testimony before the Grand Jury.

In his testimony before the Grand Jury, Judge Napolitano outlined his business dealings with the State Fair Management. This testimony related to the procedures whereby appellant secured 42 contracts for concession space at the

2. The Illinois Courts Commission was vested with the power to discipline or remove a state judicial officer for cause under Article VI, Sec. 18 of the Illinois Constitution (1870). Rule 51 of the Illinois Supreme Court implemented this constitutional provision by convening the Courts Commission and establishing its procedural rules. The Commission is composed of five state judges from various state courts.

State Fairs for each year of 1961 to 1969. The appellant usually sublet most of the locations but kept nine or ten spaces for himself.

The Grand Jury returned several indictments charging various State Fair officials with official misconduct and conspiracy. The appellant was named as a non-indicted co-conspirator.

At the direction of the Supreme Court of Illinois, appellant was relieved of all assignments on February 5, 1970. On February 13, 1970, the Illinois Courts Commission designated the Attorney General of Illinois to prepare and file a complaint against the appellant. This was done on March 19, 1970, charging him with impropriety and the appearance of impropriety in violation of the Canon of Judicial Ethics.

Beginning July 7, 1970, a formal hearing was had before the Illinois Courts Commission on these charges. Appellant was present and was represented by counsel. Documentary evidence, including the transcript of appellant's testimony before the Grand Jury, was considered.

On July 14, 1970, the Courts Commission found the evidence to be clear and convincing that appellant's conduct "... violates applicable Canons of Judicial Ethics including Canon 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office."[3]

An appeal was taken from this decision to the Supreme Court of Illinois. That Court held that the right of appeal

3. Canon 4 of the Canons of Judicial Ethics provides, "A Judge's conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach."

to that Court did not exist, holding the proceedings before the Commission to be *sui generis.*

Appellant then attempted to appeal to the Supreme Court of the United States. That Court dismissed the appeal for want of a federal question. *In re Napolitano,* 401 U.S. 971 (1971), Justice Brennan would have dismissed the appeal for want of jurisdiction.

Prior to the hearing before the Illinois Courts Commission, appellant filed a motion with the United States District Court, Northern District of Illinois, for a temporary restraining order to prevent the Commission hearing, and further requesting the convening of a three-judge court, alleging a violation of his civil rights.

The motion for a temporary restraining order was denied by the single Judge before whom the suit was filed.

A three-judge panel was convened and affirmed the dismissed of denial of the temporary restraining order. The three-judge panel then terminated the panel and remanded the case to the single judge for a determination of the factual issues raised in the complaint. *Napolitano* v. *Ward,* 317 F.Supp. 79 (N.D.Ill., 1970).

On March 26, 1971, the District Court dismissed appellant's amended complaint with prejudice and entered judgment in favor of defendants-appellees (317 F. Supp. 83). It is from this order that the appellant now appeals.

On this appeal, appellant asserts his primary argument before us is "for Declaratory Relief under 28 U.S.C. § 2201 and then such further relief as will vindicate the injury to plaintiff and redress defendants' violations of the Constitution of the United States."

The principal issue before us is whether the conduct for which appellant was removed from office may be established by the Courts Commission from the use of his

testimony before a Grand Jury compelled by a grant of full transactional immunity.

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege against self-incrimination thus protects an individual from being a witness against himself in a criminal matter and is applicable to the states through the Fourteenth Amendment. *Malloy* v. *Hogan*, 378 U.S. 1 (1964). The privilege may be invoked in any proceeding against an individual, either civil or criminal, in which testimony or evidence is requested of that individual which could expose him to later criminal prosecution.

The thrust of the Constitutional privilege against self-incrimination has two interrelated objectives, "The Government may not use compulsion to elicit self-incriminating statements, and the Government may not permit use in a criminal trial of self-incriminating statements elicited by compulsion." *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 57 n.6 (1964). The privilege is directed at insulating an individual from criminal penalties imposed from testimony or evidence said individual was compelled to give, either by physical or mental coercion, *Bram* v. *United States*, 168 U.S. 532 (1897), or by threat of contempt, *Brown* v. *Walker*, 161 U.S. 591 (1896).

However, the Constitution permits the compulsion of otherwise self-incriminatory testimony if the witness has been granted immunity coextensive with the Fifth Amendment privilege. *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Brown* v. *Walker*, *supra*; *Ullmann* v. *United States*, 350 U.S. 422 (1956); *Murphy* v. *Waterfront Commission of New York Harbor*, *supra*. In *Brown*, *supra*, the Supreme Court upheld a complete transactional immunity statute relying on the fact that under the chal-

lenged statute, a witness testifying under compulsion "operates as a pardon" for any crimes revealed by his testimony.

In *Ullmann* v. *United States, supra,* Mr. Justice Frankfurter, in an opinion for the Supreme Court, upheld a transactional immunity statute. The Court responded at page 514 to petitioner's argument that the immunity granted by the Government was not coextensive with the constitutional privilege replaced:

> "The complete answer to this is that in safeguarding him against future federal and state prosecution 'for or on account of any transaction, matter or thing concerning which he is compelled' to testify, the statute grants him immunity fully coextensive with the constitutional privilege. Some language in *Brown* v. *Walker,* 161 U.S., at 601, compares immunity statutes to the traditional declarations of amnesty or pardon, but neither in that opinion or elsewhere is it suggested that immunity statutes, to escape invalidity under the Fifth Amendment, need do more than protect a witness from future prosecutions."

Ill. Rev. Stat., 1969, Chap. 38 Sec. 106-1 provides that "in any investigation before a Grand Jury . . . the Court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce."

It is evident from the facts presented upon appeal that appellant was appropriately insulated from future Illinois criminal prosecution as a consequence of his testimony before the Grand Jury. Immediately after his testimony, various State Fair officials were indicted for their activities concerning State Fair Concession contracts. Appellant was named as an unindicted co-conspirator resulting from his dealings with State Fair concession contracts, but he never was or has been subjected to criminal prosecution

for "any transaction, matter or thing" arising from the immunized testimony.

Furthermore, appellant was not subjected to prosecution under federal law following his immunized testimony. Therefore, the transactional immunity conferred by the State of Illinois upon the appellant is consistent with the mandate of *Counselman, supra,* that absolute immunity from prosecution must be granted before the Government or other political entity can compel a witness to testify.

We hold that the transactional immunity granted appellant by the State of Illinois was coextensive with his Fifth Amendment privilege against self-incrimination.

A related question raised on this appeal by appellant is whether the hearing before the Courts Commission and his subsequent removal from office constituted a penal aspect of criminal proceedings, thereby transcending his transactional immunity.

While appellant has admitted the validity of the "for cause" standard of removal as applied to his case and so aptly applied by the District Court in *Napolitano* v. *Ward,* 317 F. Supp. 79 (N.D.Ill., 1970), he has attempted to distinguish the "for cause" standard applied to his behavior on the bench from his personal behavior apart from his judicial duties.

Canon 4 of the Judicial Canons of Ethics, is based upon the premise that both the personal and professional behavior of a judicial officer are relevant to his qualifications to act as a judge. Any violation of these Canons subject a judicial officer to discipline or to removal following proper due process requirements.

A state is not required to allow a judge to occupy a state judicial office, *Snowden* v. *Hughes,* 321 U.S. 1 (1944). The privilege of occupying such an office is one granted by a state, not a right secured by constitutional mandate.

It is clearly evident from the pertinent Court decisions that a state may require a public servant to account for the performance of his duties upon pain of dismissal, providing the judicial officer or state employee is accorded the full protection of the Fifth Amendment privilege against self-incrimination.

Furthermore, conduct which does not constitute a criminal offense may be sufficiently violative of the Judicial Canons to warrant removal for cause. The District Court so found herein. See *Friedman* v. *Court on the Judiciary of New York*, 375 U.S. 10 (1963); *Sarisohn* v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 265 F. Supp. 455 (E.D.N.Y., 1967); *Matter of Osterman*, 13 N.Y. 2d a (1963), cert. den. *Osterman* v. *Court on the Judiciary of the State of New York*, 376 U.S. 914 (1964).

Appellant's contention that he was removed for only his personal behavior is not supported from the record of this case and the pertinent Canons of Judicial Ethics. We feel the framers of the Canons were of the view that separation of the behavior of a judge while off the bench from his conduct in the courtroom is impossible.

Here appellant has been accorded every possible protection guaranteed by the Fifth Amendment. The hearing before the Illinois Court Commission afforded him a fair hearing as required by law. He has suffered no criminal punishment resulting from his immunized testimony nor was the removal herein a penal aspect of criminal proceedings.

We hold the procedures by which appellant was removed from the office of Circuit Court Judge of Cook County, Illinois, are in accord with the requirements of the Fifth Amendment.

The order and the judgment of the District Court hereinbefore discussed is

AFFIRMED.

APPENDIX B.

NAPOLITANO v. WARD

Cite as 317 F.Supp.83 (1970)

MEMORANDUM OPINION AND ORDER

PERRY, *District Judge:*

Plaintiff Richard A. Napolitano was removed from the office of Cook County Circuit Judge by the Illinois Courts Commission on July 14, 1970. The instant action, founded on the Civil Rights Act, 42 U.S.C. § 1983, names as defendants the members of said Courts Commission and other State officials and charges that plaintiff's removal violated constitutionally protected rights. Presently before the court is plaintiff's motion for a preliminary injunction to prevent the nomination of judicial candidates to fill the vacancy caused by his removal. The last day on which such nominations can be made is August 11, 1970.

[1] The factors to be considered in determining whether or not preliminary equitable relief shall issue are by now well established. The court must consider whether the injury complained of is irreparable, Crossbow, Inc. v. Glovemakers, Inc., 265 F.Supp. 202, 205 (N.D.Ill. 1967), whether the plaintiff is likely to prevail on the merits, Tele-Controls, Inc. v. Ford Industries, Inc., 388 F.2d 48, 50 (7th Cir. 1967), whether the temporary relief requested is equivalent to that ultimately sought, Blaich v. National Football League, 212 F.Supp. 319, 320 (S.D.N.Y.1962), and whether the effect of an injunction would be to alter, rather than preserve, the status quo, Local 453, Int'l Union of Electrical, Radio and Machine Workers v. Otis Elevator Co., 201 F.Supp. 213, 215 (S.D.N.Y.1962). Assuming that

the injury plaintiff will suffer absent a preliminary injunction is irreparable, this court has concluded that the other pertinent factors weigh so heavily against the exercise of equitable powers at this time that the motion for a preliminary injunction must be denied.

With regard to the likelihood that plaintiff will prevail on the merits, it appears that he raises four independent constitutional issues. His first contention, that the standard for removal of judges set out in Article VI, Section 18 of the Illinois Constitution, S.H.A. is unconstitutionally vague and overbroad, was decided adversely to him by a three judge court on July 31 of this year.

Plaintiff's second constitutional challenge is that his removal violated the Fifth Amendment because it was based in part on the fact that he invoked the privilege against self-incrimination when called to testify before a Sangamon County grand jury in January, 1970. But it has never been the law that no consequences may attend the exercise of this privilege. See Harlan, J., dissenting in Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). And although that case established that an attorney may not be disbarred for invoking this privilege, the law is different with regard to removal of public employees. In Gardner v. Broderick, 392 U.S. 273, 278, 88 S.Ct. 1913, 1916, 20 L.Ed.2d 1082 (1968), the Court stated that the Spevack rule was inapplicable to a policeman:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties * * * the privilege against self-incrimination would not have been a bar to his dismissal."

The rationale given for this distinction, that a policeman as a public employee owes his entire loyalty to the state, whereas an attorney does not, is equally applicable to a

judge.[1] The public has a right to inquire whether a member of its judiciary, invested with a public trust, is worthy of that trust. And although the state may not draw an inference of guilt from his exercise of his constitutional right of silence, it may rightfully be dismayed at the lack of candor and cooperation manifested thereby.

[2] The spectacle of a judge invoking the Fifth Amendment is not a pretty one, for a judge owes an obligation to cooperate in promoting enforcement of the law. Unwillingness to fulfill that duty, as shown by reluctance to aid in a grand jury investigation of suspected criminal activity, may properly be considered to be evidence of a disregard for this obligation. See In Re Sarisohn, 27 A.D.2d 466, 280 N.Y.S.2d 237, 243 (1967), rev'd. on other grounds, 21 N.Y.2d 36, 286 N.Y.S.2d 255, 233 N.E.2d 276, holding that a judge's refusal to answer questions at a removal proceeding constitutes cause for removal.

After plaintiff exercised his privilege against self-incrimination, he was granted immunity from prosecution based on any testimony he might give thereafter before the grand jury. His third allegation of a constitutional violation is that reliance upon his testimony as establishing cause for his removal violated his privilege against self-incrimination. But the Fifth Amendment in terms states only that "(n)o person shall be compelled in any criminal case to be a witness against himself * * *," and it seems apparent that the Courts Commission proceedings do not qualify as a "criminal case." The Commission is not empowered to impose either imprisonment or a fine; its

1. Although In re Holland, 377 Ill. 346, 36 N.E.2d 543 (1941), can be read to mean that a judge cannot, consistently with the Illinois Constitution, be disciplined for exercising his privilege against self-incrimination, the Court was there concerned with suspension of Holland as an attorney rather than as a judge. And of course a state court's interpretation of that state's constitutional privilege against self-incrimination is not binding on a federal court when presented with questions of federal constitutional law.

authority is limited to suspending or removing a judge from office. See Article VI, Section 18 of the Illinois Constitution. See also, In Re Damisch, 38 Ill.2d 195, 206, 230 N.E.2d 254 (1967), holding that a disciplinary proceeding as applied to an attorney "is not a criminal prosecution." And see Bar Association of Erie County v. Gelman, 285 N.Y.S.2d 691 (S.Ct.App.Div. 1967), which is to the same effect.

Plaintiff has cited no authority for the proposition that testimony given under a grant of immunity from prosecution may not be used in a disciplinary or removal proceeding. And what authority does exist is to the contrary. In Re Ungar, 282 N.Y.S.2d 158 (S.Ct.App.Div.1967), In Re Selig, 32 A.D.2d 213, 302 N.Y.S.2d 94 (S.Ct.App.Div. 1969) and In Re Klebanoff, 21 N.Y.2d 920, 289 N.Y.S.2d 755, 237 N.E.2d 75 (Ct. of App.1968), all held that testimony given by an attorney before a grand jury pursuant to a grant of immunity may constitute a basis for taking disciplinary action. And Zuckerman v. Greason, 20 N.Y.2d 430, 285 N.Y.S.2d 1, 231 N.E.2d 718 (Ct. of App.1967), held that testimony given by an attorney at a disciplinary hearing, although constitutionally inadmissible in a criminal prosecution, could be used as a basis for taking disciplinary measures.

[3] Taken together, plaintiff's self-incrimination arguments amount to the claim that he can be removed neither for exercising the privilege nor for conduct to which he admitted when the privilege was protected by a grant of immunity. In effect, he is arguing that he has a federal right to remain as a judge regardless of his conduct. But there is no constitutional right to public office, United States v. Field, 193 F.2d 92, 106 (2d Cir. 1951) (separate opinion of Frank, J.), and "(t)here is no divine right of judges to flout the law." Jenkins v. Oregon State Bar, 241 Or. 283, 405 P.2d 525, 529 (1965).

Plaintiff's fourth constitutional challenge is that the Commission based its decision on "ancestoral, ethnic and vocational associations" in violation of the equal protection clause of the Fourteenth Amendment. This is a serious charge and yet no facts are cited to support it nor has any evidence whatever been adduced to substantiate it.

One final point bears mention with regard to consideration of whether plaintiff is likely to prevail on the merits. 28 U.S.C. § 2283 provides that, except in specified instances, "(a) court of the United States may not grant an injunction to stay proceedings in a State court." There appears to be a substantial question whether Courts Commission proceedings qualify as "proceedings in a State court" and, if so, whether the relief requested falls under the statute's prohibition.

[4] Based upon the foregoing analysis, this court has concluded that there is little likelihood that plaintiff will prevail upon a final hearing.

It is also significant that the preliminary relief requested is virtually equivalent to that ultimately sought, and would operate to disturb the status quo. For the injunction requested would prevent the nomination of candidates to fill plaintiff's former office and might well extend the vacancy beyond the time set for the next election. No sufficient reason has been advanced to justify this serious disruption of the State's electoral machinery.

For the reasons stated herein, this court finds that plaintiff has failed to demonstrate sufficient justification for the requested relief. The motion for a preliminary injunction is denied.

FILE COPY

FILED
NOV 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

THE HONORABLE DANIEL P. WARD, JUSTICE, SUPREME COURT OF ILLINOIS, ET AL.,

Respondents.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.)

BRIEF OF THE RESPONDENTS IN OPPOSITION.

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570),

Attorneys for Respondents.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.

Printed by the Authority of the State of Illinois

INDEX.

PAGE

Jurisdictional Statement 1

Statement of the Case 2

Reasons for Denying the Writ:

Neither the Fifth Nor the Fourteenth Amendment Prohibits the Use of Testimony Given Pursuant to a Grant of Full Transactional Immunity in a Subsequent Civil Proceeding Instituted to Remove the Immunized Witness from the Office of State Court Judge 6

Conclusion 18

Authorities Cited.

Cases.

Bram v. *United States*, 168 U. S. 532 (1897) 9

Brown v. *United States*, 359 U. S. 41 (1959) 10

Brown v. *Walker*, 161 U. S. 591 (1896) 9, 10

Cave v. *State of Missouri ex rel. Newell*, 246 U. S. 650 (1918) 11

Counselman v. *Hitchcock*, 142 U. S. 547 (1892) 8

Cusack v. *Howlett*, 44 Ill. 2d 233 (1969)..... 14

Friedman v. *Court on the Judiciary of New York*, 375 U. S. 10 (1963) 13

Gardner v. *Broderick*, 392 U. S. 273 (1968) 14

Grosso v. *United States*, 390 U. S. 62 (1968) 10

In Re Klebanoff, 289 N. Y. S. 2d 755 (Ct. of App. 1968) 17

In the Matter of Napolitano, 401 U. S. 951 (1971) 1, 5

In Re Sarisohn, 275 N. Y. S. 2d 355 (1966) 13

In Re Selig, 302 N. Y. S. 2d 94 (S. Ct. App. Div. 1969) 17

In Re Ungar, 232 N. Y. S. 2d 158 (S. Ct. App. Div. 1967) 17

Kastigar v. *United States*, ... U. S. ....., 92 S. Ct. 1653 (1972) 7, 8

Malloy v. *Hogan*, 378 U. S. 1 (1964) 8

Marchetti v. *United States*, 390 U. S. 39 (1968) 10

Matter of Kane v. *Rudich*, 10 N. Y. S. 2d 929 (1939) ... 13

Matter of Osterman, 13 N. Y. 2d a (1963), *cert. den. Osterman* v. *Court of the Judiciary of the State of New York*, 376 U. S. 914 (1964) 13

Murphy v. *Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964) 8, 9

Napolitano v. *Ward*, 317 F. Supp. 79 (N. D. Ill. 1970).. 5

Napolitano v. *Ward*, 317 F. Supp. 83 (N. D. Ill. 1970).. 5

Napolitano v. *Ward*, 457 F. 2d 279 (1972) 6

One 1958 Plymouth Sedan v. *Pennsylvania*, 380 U. S. 693 (1965) 9

Reina v. *United States*, 364 U. S. 507 (1960) 10

Sarisohn v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 265 F. Supp. 455 (E. D. N. Y. 1967) 13

Snowden v. *Hughes*, 321 U. S. 1 (1944) 9, 10

Taylor and Marshall v. *Beckham*, 178 U. S. 548 (1900) 11

Ullmann v. *United States*, 350 U. S. 422 (1956) 9, 10

Uniform Sanitation Men Ass'n, Inc. v. *Commissioner of Sanitation*, 392 U. S. 280 (1968) 15, 16

United States v. *United States Coin and Currency*, 401 U. S. 715 (1971) 9

Wilson v. *North Carolina*, 169 U. S. 586 (1898) 11

Zicarelli v. *New Jersey Commission of Investigation*, ____ U. S. ____, 92 S. Ct. 1670 (1972) 7, 8

Zuckerman v. *Greason*, 20 N. Y. 2d 430 (Ct. of App. 1967), *cert. den.*, 390 U. S. 925 (1968) 17

CONSTITUTIONS, STATUTES, AND COURT RULES.

Ill. Const., Art. VI, Sect. 15 11

Ill. Const. (1870), Art. IV, Sect. 4 12

Ill. Const. (1870), Art. VI, Sect. 8 2

Ill. Const. (1870), Art. VI, Sect. 18 .....11, 14

Ill. Const. (1870), Art. VI, Sect. 19 11

Title 28 U. S. C. § 1257(2) 1

Title 28 U. S. C. § 1254(1) 1

Ill. Rev. Stat. 1969, Ch. 38, § 106-1 et seq. 7, 12

U. S. Supreme Court Rule 16 2

Ill. Supreme Court Rule 51 11

OTHER AUTHORITIES.

4 Bl. Comm. 381 9

Canons of Judicial Ethics 6, 13

Note, 68 Colum. L. Rev. 785 (1968) 2

4 Steph. Comm. 447 9

Stern and Gressman, *Supreme Court Practice*, (4th ed. 1969) 2

8 Wigmore on Evidence, § 2282, 2283 (McNaughten Rev. 1961) 10

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

THE HONORABLE DANIEL P. WARD, JUSTICE, SUPREME COURT OF ILLINOIS, ET AL.,

Respondents.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.)

BRIEF OF THE RESPONDENTS IN OPPOSITION.

JURISDICTIONAL STATEMENT.

Petitioner grounds jurisdiction for his petition on Title 28 U. S. C. §1254(1). However, he ignores the prior decision on the merits of his case rendered by this Court in *In Re Napolitano,* 401 U. S. 951 (1971). Following his removal by the Illinois Courts Commission, petitioner appealed directly to this Court pursuant to Title 28 U.S.C. §1257(2). Respondents herein filed a Motion To Dismiss or Affirm on the basis that the appeal failed to present a substantial federal question and that the decision of the Illinois Courts Commission was correct. On March 8, 1971, this Court dismissed the appeal for want of a substantial federal question (Mr. Justice Brennan would have dismissed the appeal for want of jurisdiction). That dismissal is a decision by this Court that the totality of the proce-

dures, including the use of petitioner's immunized grand jury testimony, by which the petitioner herein was removed from the office of judge presents no substantial federal question.

Unlike a denial of certiorari, the dismissal of an appeal from a state court for want of a substantial federal question is a decision on the merits of the issues presented by the appeal. It is an expression of the court's opinion that the decision below was correct. In effect, it is the equivalent of an affirmance on the merits of an appeal from a federal court. See Stern and Gressman, *Supreme Court Practice* (4th ed. 1969) 197, 233; Note, 68 Colum. L. Rev. 785, 791 (1968); *Supreme Court Rules* 16 (1) (b) and 16 (1) (c).

Thus, the dismissal of petitioner's direct appeal by this Court is res judicata of the issue presented herein. The instant petition for writ of certiorari therefore should be denied.

STATEMENT OF THE CASE.

The petitioner herein is a former State legislator who was elected to the Municipal Court of the City of Chicago in 1963. Following the reorganization of the Illinois judicial system effective January 1, 1964, appellant automatically became an associate judge of the Circuit Court of Cook County, Illinois.[1] He was elected a full circuit judge in 1968.

In September of 1969, the Sangamon County Grand Jury began its investigation into charges relating to the administration and management of the Illinois State Fair. During this investigation, Judge Napolitano was called as a witness by the Grand Jury. He refused to answer

1. The only difference between associate judges and full circuit judges under Art. VI, sect. 8 of the Illinois Constitution (1870) is that an associate judge may not serve as Chief Judge of the Circuit Court.

any questions relating to his business dealings with the State Fair on the ground that any answers he might give would tend to incriminate him. Upon motion of the State's Attorney, Judge Napolitano was granted full transactional immunity in return for his testimony.

The petitioner returned to the Grand Jury and gave extensive testimony in which he outlined his business dealings with the State Fair management. This testimony related to the procedures whereby the petitioner secured forty-two contracts for concession space at State Fairs for each year during the period 1961 to 1969.[2] (Tr. 24)[3] Those contracts secured in advance of the Fair each year were obtained by the petitioner, using various fictitious names. Petitioner obtained additional contracts at the beginning or during a Fair by making a personal appearance at the State Fair office. Napolitano sublet most of the locations represented by the forty-two contracts which he held, keeping nine or ten spaces for himself.

The Grand Jury subsequently returned several indictments charging various State Fair officials with official misconduct and conspiracy. The petitioner was named as an unindicted co-conspirator. Several counts of these indictments were later dismissed for technical deficiencies.

At the direction of the Supreme Court of Illinois, the Chief Judge of the Circuit Court of Cook County relieved the petitioner of all assignments on February 5, 1970.

On February 13, 1970, the Illinois Courts Commission designated the Attorney General of Illinois to prepare and file a complaint against Judge Napolitano. The com-

2. Prior to 1961, the appellant held more than forty-two contracts for concession stands (Tr. 24).

3. "Tr" refers to the transcript of the petitioner's testimony before the Grand Jury, which was received as evidence in the proceedings before the Illinois Courts Commission (Pl. Exh. No. 4).

plaint was filed on March 19, 1970, and charged Napolitano with impropriety and the appearance of impropriety in violation of the Canons of Judicial Ethics. The charges were supported by a specification of facts relating to the petitioner's involvement with the concession business at the Illinois State Fair.

A formal hearing into these charges began on July 7, 1970, before the Illinois Courts Commission. The petitioner was present and represented by counsel. The Commission received testimony from several witnesses and documentary evidence, including the transcript of the petitioner's testimony before the Sangamon County Grand Jury.

On July 14, 1970, the Illinois Courts Commission removed the petitioner from the office of judge of the Circuit Court, finding the evidence to be clear and convincing that the petitioner had violated the applicable Canons of Judicial Ethics.

An appeal from this decision to the Supreme Court of Illinois was dismissed on September 23, 1970, with the following statement: "Proceedings before the Commission are *sui generis* and are governed entirely by the rule which created the Commission. In the absence of a provision for appeal, no right to appeal exists."

Petitioner then appealed to the Supreme Court of the United States. In his Jurisdictional Statement, he detailed the proceedings before the Courts Commission which resulted in his removal from office. He argued that these proceedings, including the use of his Grand Jury testimony, violated his constitutional rights under Article I, Sect. 10, and the fourth, fifth, sixth and fourteenth amendments of the federal Constitution. The appellee Illinois Courts Commission filed a Motion to Dismiss or Affirm with the Supreme Court on the basis that no substantial federal

question had been presented and that the decision of the Illinois Courts Commission was correct.

On March 8, 1971, the Supreme Court dismissed the appeal for want of a substantial federal question. *In the Matter of Napolitano*, 401 U. S. 951 (1971). (Mr. Justice Brennan would have dismissed the appeal for want of jurisdiction.)

Prior to the hearing before the Illinois Courts Commission, the petitioner filed a motion with the United States District Court for the Northern District of Illinois, Eastern Division. He requested a temporary restraining order to prevent the Commission hearing and further requested the convening of a three-judge court pursuant to Title 28 U. S. C. §§ 2281 and 2284, alleging a violation of his civil rights. The motion for a temporary restraining order was denied by the single judge before whom the action was filed. A three-judge panel was convened and affirmed the denial of the temporary restraining order. The three judge panel further found that petitioner's pleadings presented no substantial federal question and terminated the panel, remanding the case to the single judge for a determination of the factual issues raised by the complaint. *Napolitano* v. *Ward*, 317 F. Supp. 79 (N .D. Ill. 1970) (Judge Decker dissenting only as to the remand to the single judge).

The District Court on August 5, 1970, denied the petitioner's request for a preliminary injunction to prevent the nomination of candidates to fill the judicial vacancy caused by his removal from office. After considering petitioner's argument that the use of his Grand Jury testimony by the Commission violated the fifth amendment privilege against self-incrimination, the District Court found that there was little likelihood that the petitioner would prevail in a final hearing on the merits of this issue. *Napolitano* v. *Ward*, 317 F. Supp. 83 (N. D. Ill. 1970).

On March 26, 1971, following the dismissal of the appeal from the decision of the Illinois Courts Commission by the Supreme Court of the United States, the District Court dismissed the petitioner's amended complaint with prejudice and entered judgment in favor of the defendants.

Petitioner appealed this judgment to the United States Court of Appeals for the Seventh Circuit. The sole issue presented by that appeal was whether testimony which had been compelled pursuant to a grant of full transactional immunity may be used as evidence in a subsequent civil proceeding to remove the witness from the office of judge.

On March 21, 1972, the Court of Appeals affirmed the judgment of the District Court. *Napolitano* v. *Ward*, 457 F. 2d 279 (7th Cir. 1972). It is from this decision that the petitioner seeks redress by writ of certiorari.

REASONS FOR DENYING THE WRIT.

Neither the Fifth Nor the Fourteenth Amendment Prohibits the Use of Testimony Given Pursuant to a Grant of Full Transactional Immunity in a Subsequent Civil Proceeding Instituted to Remove the Immunized Witness From the Office of State Court Judge.

> "A Judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach." Canon 4, Canons of Judicial Ethics.

The petitioner was removed from the office of judge of the Circuit Court of Cook County for "conduct unbecoming a Judge" in violation of the applicable Canons of Judicial Ethics including Canon 4, quoted above. The sole

issue upon which petitioner predicates his petition to this Court is whether the conduct for which he was removed from office may be established by the use of testimony which he gave before the Sangamon County Grand Jury pursuant to a grant of transactional immunity which protected him from future criminal prosecution for matters about which he testified. The use of this testimony in a civil proceeding before the Illinois Courts Commission was proper and did not infringe upon the petitioner's fifth amendment privilege against compulsory self-incrimination.

Richard Napolitano was granted full transactional immunity in return for his grand jury testimony.[4] By conferring this immunity, the State of Illinois has relinquished the right to hold the petitioner accountable in a criminal proceeding for any offense shown in whole or in part by his immunized testimony. This procedure comports fully with the mandate of the fifth amendment privilege against self-incrimination. See *Kastigar* v. *United States*, ... U. S. ....., 92 S. Ct. 1653 (1972), *Zicarelli* v. *New Jersey Commission of Investigation*, ... U. S. ....., 92 S. Ct. 1670 (1972).

The anti-incrimination prohibition of the fifth amendment, however, does not protect the petitioner from civil procedures resulting in his removal from the office of state court judge.

---

4. The statutory authority for the grant of immunity to petitioner is Ill. Rev. Stat. 1969, Ch. 38, § 106-1 which provides:

> "In any investigation before a Grand Jury, or trial in any court of record, the court on motion of the state may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.

Section 106-2 delimits the effect of this immunity.

> "Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony."

The fifth amendment protects an individual from being compelled to be a witness against himself in a criminal case. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The privilege may be invoked in any proceeding, civil or criminal, in which testimony or evidence is requested which would expose the witness to a later criminal prosecution. The focus of the privilege, however, is directed toward the criminal proceeding. If the witness is insulated from future criminal prosecution, as was the appellant herein, there can be no question that the requirements of the privilege have been met. See *Kastigar* v. *United States, supra.; Zicarelli* v. *New Jersey Commission of Investigation, supra.*

The only revelant question then is whether the fifth amendment extends its protection to a civil proceeding to determine the fitness of a judge to continue in judicial office when the possibility of criminal sanction has been completely removed.

The fifth amendment provides that "No person . . . shall be compelled *in any criminal case* to be a witness against himself" (emphasis added). This protection is applicable to the states through the fourteenth amendment. *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The Supreme Court of the United States has stated: "The Constitutional privilege against self-incrimination has two primary interrelated facets: The Government may not use compulsion to elicit self-incriminating statements, and the Government may not permit the use in a criminal trial of self-incriminating statements elicited by compulsion." *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52, 57 n. 6 (1964) (citations omitted). The Constitution, however, does not prohibit the compulsion of otherwise incriminatory testimony if the witness has been granted immunity coextensive with the fifth amendment privilege. *Counselman* v. *Hitchcock,* 142 U. S. 547 (1892);

Brown v. *Walker,* 161 U. S. 591 (1896); *Ullmann* v. *United States,* 350 U. S. 422 (1956); *Murphy* v. *Waterfront Commission of New York Harbor,* 378 U. S. 52 (1964).

The petitioner does not contest the validity of the immunity conferred during the proceedings in this case. The issue of whether transactional or use immunity is constitutionally required is irrelevant here. Petitioner was granted full transactional immunity. The only question is whether the fifth amendment precludes the use of statements from which all criminality has been removed in a civil proceeding inquiring into the witness' qualifications to hold judicial office.[5]

There can be no question that the fifth amendment privilege is directed solely toward protecting an individual from a criminal penalty imposed upon the basis of testimony or evidence which the individual was compelled, either by physical or mental coercion, *Bram* v. *United States,* 168 U. S. 532 (1897), or by threat of contempt, *Brown* v. *Walker,* 161 U. S. 591 (1896), to give. The holding of *Brown* is equally applicable to the instant case.

---

5. Petitioner's characterization of his removal from the bench as a "forfeiture" of his office and therefore a criminal penalty prohibited by the grant of transactional immunity, is legally deficient. A forfeiture is the "loss of lands or goods to the State as the consequence of crime." 4 Bl. Comm. 381, 387; 4 Steph. Comm. 447, 452. See also One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 (1965); United States v. United States Coin and Currency, 401 U. S. 715 (1971). The office of judge of the Circuit Court of Cook County, Illinois is not property. As the Supreme Court noted in Snowden v. Hughes, 321 U. S. 1, 7 (1944):

> "More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause."

The petitioner has not been deprived of goods or property related to the commission of a criminal offense. The concept of forfeiture clearly does not apply to petitioner's removal for cause from a state judicial office.

In *Brown* v. *Walker,* the Supreme Court reviewed the sufficiency of a federal statutory grant of immunity which protected the witness from future criminal prosecution, as does the Illinois statute pursuant to which the petitioner herein was granted immunity. The Supreme Court in *Brown* upheld the federal statute over a fifth amendment challenge, stating:

> "The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty. . . . [W]hile the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, *its object is fully accomplished by the statutory immunity,* and we are therefore of the opinion that the witness was compellable to answer. . . ." (161 U. S. at 601, 610) (emphasis added)

Accord *Ullmann* v. *United States,* 350 U. S. 422 (1956); *Brown* v. *United States,* 359 U. S. 41 (1959); *Reina* v. *United States,* 364 U. S. 507 (1960); *Marchetti* v. *United States,* 390 U. S. 39, 72, 73 (1968); *Grosso* v. *United States,* 390 U. S. 62, 72, 73 (1968) (concurring opinion of Mr. Justice Brennan). And see 8 Wigmore on Evidence §§ 2282, 2283 (McNaughten Rev. 1961).

The objective of the fifth amendment privilege has likewise been fully accomplished in the instant case. The State of Illinois has totally relinquished the right to criminally prosecute the petitioner for any offense shown in whole or in part by his immunized testimony before the Sangamon County grand jury. Petitioner's rights under the fifth amendment have been fully protected.

The State is not required, however, to allow the petitioner to continue to occupy the office of judge. Occupation of state judicial office is a privilege granted by the State, not a right secured by the federal or state constitutions. *Snowdon* v. *Hughes,* 321 U. S. 1, 7 (1944); *Cave* v. *State of*

Missouri ex rel. Newell, 246 U. S. 650 (1918); *Taylor and Marshall* v. *Beckham,* 178 U. S. 548 (1900). The State quite properly may condition the occupation of such an office upon compliance with reasonable rules of conduct. As the Supreme Court stated in *Wilson* v. *North Carolina,* 169 U. S. 586, 589 (1898):

> "In its internal administration the state (so far as concerns the federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. And in such matters the decision of the state court that the procedure by which an officer has been suspended or removed from office was regular, and was under a constitutional and valid statute, must generally be conclusive in this court."

Article VI, sect. 18 of the Illinois Constitution (1870) vested in the Illinois Courts Commission the power to remove a judge for cause. Supreme Court of Illinois Rule 51 implemented the constitutional provision by convening the Commission and establishing the procedures to be followed in proceedings before it. The Commission is composed of five judges, one judge of the state Supreme Court, two judges of the Appellate Court and two circuit judges. It is this body which is vested with the power to either discipline or remove a state judicial officer under the Illinois Constitution (1870). See Art. VI. Sect. 15 of the newly adopted Constitution which embodies the same provision with minor procedural changes.

Pursuant to its power under Art. VI sect. 19 of the state Constitution (1870), the Supreme Court of Illinois has convened a Judicial Conference. This Conference in 1964 readopted the Judicial Canons of Ethics which provide a guideline by which judges in Illinois are required to conduct themselves, both on and off the bench. A viola-

tion of these Canons subjects a judicial officer to discipline or to removal from the bench by the Illinois Courts Commission.

As he did in the court below, the petitioner appears to argue here that since the grand jury investigation did not center on his performance of his judicial duties, he was removed solely upon the basis of his personal behavior in his everyday life.[6]

He contends that since this personal behavior was not related to his judicial duties, Art. IV, sect. 4 of the Illinois Constitution (1870) which limits ineligibility for public office to criminal convictions for bribery, perjury or other infamous crime should govern. Thus, absent a criminal conviction for one of these offenses, he may not be removed from judicial office.

By pyramiding inapt and unwarranted factual conclusions, petitioner thus has reached a totally erroneous conclusion as to the applicable constitutional provision in this case. The fact that the Sangamon County Grand Jury was investigating alleged mismanagement of the Illinois State Fair, rather than inquiring into the official misconduct of a judge (which incidentally a grand jury has no power to do, as this function is vested solely in the Illinois Courts Commission) in no way precludes the conclusion that if a judge is called and testifies before the grand jury, that his testimony, as in the instant case, may reflect such impropriety of conduct as to justify his removal from the bench. This is true whether or not this

6. Petitioner also states that "his suspected conduct concerning State Fair contracts has been held criminally innocent in the court of criminal jurisdiction" (Petition 18). This statement is totally untrue. Petitioner was granted full transactional immunity in return for his grand jury testimony concerning his involvement with the Illinois State Fair. He has never been, nor can he be, subjected to criminal prosecution for the matters about which he gave testimony pursuant to the grant of immunity. Ill. Rev. Stat. 1969, Ch. 38, § 106-2.

testimony would establish either in whole or in part the commission of a criminal offense. The Judicial Canons of Ethics generally, and Canon 4 in particular, are based upon the premise that the personal and professional behavior of a judge are both relevant to a judge's qualifications to sit as a judicial officer. And further, they exact an admittedly higher standard of conduct from a judge than is required of other public employees. Thus, conduct which does not constitute a criminal offense may be sufficiently violative of the Judicial Canons to warrant removal for cause. *In the Matter of Napolitano*, 401 U. S. 951 (1971); *Friedman* v. *Court on the Judiciary of New York*, 375 U. S. 10 (1963); *Sarisohn* v. *Appellate Division, Second Department, Supreme Court of the State of New York*, 265 F. Supp. 455 (E. D. N. Y. 1967); *In Re Sarisohn*, 275 N. Y. S. 2d 355 (1966); *Matter of Osterman*, 13 N. Y. 2d a (1963), *cert. den., Osterman* v. *Court on the Judiciary of the State of New York;* 376 U. S. 914 (1964); *Matter of Kane* v. *Rudich*, 10 N. Y. S. 2d 929 (1939).

Petitioner's factual conclusion that he was removed only on the basis of personal behavior not involving his judicial functions is erroneous for two reasons. It is impossible to separate the behavior of a judge while off the bench from his conduct of cases before him for the purpose of assessing the totality of his qualifications to be a judge. See Judicial Canons of Ethics, Canon 4. And second, petitioner's testimony before the grand jury reflects the involvement of petitioner's position as a state judicial officer with the efficient functioning of his "personal" concession business. Petitioner appeared personally to obtain prime locations at the State Fair for others in return for a $1,000 fee. (T. 58) He engaged the services of an attorney who consistently appeared before the petitioner in Housing Court for the purpose of trying to reacquire concession contracts which petitioner had held

under ficticious names when the reorganized State Fair management relet the contracts in 1969 after being unable to locate the persons named in petitioner's 1968 contracts (Tr. 49). Petitioner solicited financial contributions to his political organization from persons to whom he sublet concession space contracts (Tr. 73), and he interrupted his court call to accept telephone communications relating to his concession business with the State Fair (Tr. 48). Petitioner's testimony clearly reflects the involvement of his judicial office with his concession business.

Petitioner's conclusion of law is equally incorrect. Although earlier constitutional provisions allowed the state legislature to remove a judge from office for cause and inferentially to prescribe standards of judicial conduct, the new Judicial Article which became effective January 1, 1964 replaced this provision with Art. VI, sect. 18 authorizing the creation of the Courts Commission and vesting the Supreme Court with authority to prescribe standards of judicial conduct. The legislature is totally without authority to define the qualifications for judicial office (as by defining what crimes are infamous) or to enact standards of judicial ethics. *Cusack* v. *Howlett*, 44 Ill. 2d 233 (1969). Article IV of the Constitution of 1870 creates the legislative department of the government of Illinois and has no application to the instant case.

Thus under the state constitution, the petitioner properly was removed from the office of judge. The sole question involving a federal right of the petitioner which he raised below and upon which he predicates the instant petition is whether testimony given pursuant to a valid grant of transactional immunity may be used as evidence in a civil removal proceeding consistently with the fifth amendment privilege against self-incrimination.

The opinions of this Court in *Gardner* v. *Broderick*, 392 U. S. 273 (1968) and *Uniform Sanitation Men Ass'n.* v.

Commissioner of Sanitation, 392 U. S. 280 (1968) indicate the proper resolution of this issue. In *Gardner*, this Court reviewed a provision of the New York City charter which provided for the discharge of a police officer for failure to sign a waiver of immunity from prosecution. Gardner, a New York City policeman, had been subpoenaed by a county grand jury investigating charges of bribery and police corruption in relation to certain gambling operations. The officer appeared before the grand jury and was advised that he would be questioned concerning his official duties. He was told of his fifth amendment privilege but was asked to sign a waiver of immunity from prosecution. He was also told that if he refused he would be fired. He refused to sign the waiver, an administrative hearing was held, and he was fired solely for his refusal. He appealed this decision on the ground that his dismissal from office for failure to waive immunity from criminal prosecution violated the privilege against self-incrimination.

The court found that the fifth amendment prohibits the coercion of a waiver of the immunity conferred by the privilege against self-incrimination through the threat of loss of employment. Gardner's testimony was sought not only to secure an accounting of his conduct as a public servant, but also as a basis for a later criminal prosecution of the officer. In rendering this decision, the court noted that if the only purpose in calling the officer to testify had been to obtain an accounting of the performance of his official duties, there would have been no reason to seek the waiver of immunity. (392 U. S. at 279). Such an accounting would be useless if the City lacked the power to discharge the officer should his immunized testimony reflect improper performance of his duties. The Court found that:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being

> required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself. *Garrity* v. *State of New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." (392 U. S. at 278)

The Court's opinion indicates that a public officer or employee who has been accorded the full protection of the fifth amendment privilege against self-incrimination by a grant of immunity from criminal prosecution, may be discharged from office either for failure to answer questions relating to the performance of his official duties or for the content of his answers when given pursuant to a valid grant of immunity.

This conclusion is reinforced by the companion decision in *Uniform Sanitation Men Ass'n., Inc., supra.* There this Court held that the fifth amendment privilege was violated by the discharge of City employees who refused to sign waivers of immunity when called to testify before a grand jury or who invoked the privilege in an administrative proceeding after being advised that their answers could be used against them in a criminal proceeding.

> "Petitioners were not discharged merely for refusal to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege." (392 U. S. at 283)

The court reiterated its statement in *Gardner* that if an employee's right to immunity is not at stake, he may be compelled to account for his performance of his official duties upon pain of dismissal. (392 U. S. at 284). The court concluded:

> "[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their

performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." (392 U. S. at 285)

It is clear from these decisions that a state may require a public servant to account for the performance of his duties upon pain of dismissal provided the officer or employee is accorded the full protection of the fifth amendment privilege against self-incrimination. Logic demands that if the employee's accounting reflects his ineligibility to continue in his employment or office, he may, after proper proceedings, be discharged or removed.[7]

In the instant case, the petitioner was accorded every possible protection guaranteed to him by the fifth amendment. By granting him full transactional immunity, the State has removed the element of criminality from his grand jury testimony. Having completely relinquished the right to hold him accountable for any criminal offense established by his testimony or its fruits, the State is free to require an accounting of petitioner's performanance of his public trust and to remove him from office upon a showing of improper conduct. As the court below held, the procedures by which the petitioner was removed from the office of Circuit Court judge comport fully with the requirements of the fifth amendment and must be sustained.

7. This conclusion has been adopted and applied by New York as a reasonable and constitutionally permissible means of disciplining attorneys. See Zuckerman v. Greason, 20 N. Y. 2d 430, 285 N. Y. S. 2d 231 N. E. 2d 718 (Ct. of App. 1967) cert. den. 390 U. S. 925 (1968); In Re Ungar, 282 N. Y. S. 2d 158 (S. Ct. App. Div. 1967); In Re Selig, 32 A. D. 2d 312, 302 N. Y. S. 2d 94 (S. Ct. App. Div. 1969); In Re Klebanoff, 21 N. Y. 2d 920, 289 N. Y. S. 2d 755, 237 N. E. 2d 75 (Ct. of App. 1968).

CONCLUSION.

For the aforementioned reasons, the Respondents herein respectfully request this Court to deny the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570).

Attorneys for Respondents.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.

INDEX TO REPLY TO OPPOSITION BRIEF.

PAGE

Reply to Respondents' Jurisdictional Statement 1

Summary dismissal of an appeal under 28 U. S. C. § 1257(a) does not *res adjudicata* an action under 28 U. S. C. § 1343 and 42 U. S. C. § 1983. This Court would not over rule its decisions from Boyd v. United States through Kastigar v. United States by summary declaration—"dismissed for want of a substantial federal question."

The Questions Remain the Same 6

The right against self-incrimination embrace the privilege and the immunity and both rest upon the concern for the protection of the innocent who might be criminally ensnared under the ambiguity of circumstance.

Supplemental Statement of the Case as Found by the Seventh Circuit 7

Supplemental Reasons for Granting the Writ..... 9

A criminal penalty can not be inflicted for the appearance of criminality and the decisions below and respondent's reasons for denying the writ contradict Boyd v. United States, U. S. v. U. S. Coin & Currency, Kastigar v. U. S. and Zicarelli v. Investigating Commission and the logic of Murphy v. Waterfront Comm'n 9

The privilege against self-incrimination is to protect the innocent from ensnarement by ambiguous circumstances and the use of Constitutionally compelled testimony to create and compound criminality ambiguity contradicts the concepts and values embraced by Slochower v. Bd. of Ed. of N. Y., Murphy v. Waterfront Comm'n and Griffin v. California 10

Criminal penalties may not be inflicted for criminally innocent improprieties and the use of the federal right against self-incrimination to that end contradict Giaccio v. Pennsylvania and Bouie v. Columbia 13

Conclusion 14

INDEX OF CITATIONS.

Cases.

Bouie v. Columbia, 378 U. S. 347 ..... 6, 13

Boyd v. U. S., 116 U. S. 616 ..... 5, 6, 9, 10

England v. Louisiana Medical Examiners, 375 U. S. 411 4

Gardner v. Broderick, 392 U. S. 273 6

Garrity v. New Jersey, 385 U. S. 473 6

Giaccio v. Pennsylvania, 382 U. S. 339 ..... 6, 13

Govt. Employees v. Windsor, 353 U. S. 364 4

Griffin v. California, 380 U. S. 609 11

Kastigar v. U. S., 406 U. S. 441 ..... 5, 6, 9, 13

McGautha v. California, 402 U. S. 183 3

Murphy v. Waterfront Comm'n, 378 U. S. 52 ..... 10, 12, 13

Napolitano v. Ward, 317 F. Supp. 79 ..... passim

Napolitana v. Ward, 317 F. Supp. 83 ..... passim

Napolitano v. Ward, 457 F. 2d 279 (7th Cir.) ..... passim

Napolitano, In re, 401 U. S. 951 ..... 1, 2, 3, 4

Peo. ex rel. Keenan v. McGuane, 13 Ill. 2d 520, 150 NE 2d 168 ..... 3, 12

Reina v. U. S., 364 U. S. 507 8

Slochower v. Bd. of Ed. of N. Y., 350 U. S. 551 ..... 5, 11, 12

Speiser v. Randall, 357 U. S. 513 5

Ullmann v. U. S., 350 U. S. 422 .....9, 11
U. S. v. U. S. Coin & Currency, 401 U. S. 715 ....5, 6, 9, 10
Zicarelli v. N. J. Ins. Comm., 406 U. S. 472 6

Statutes.

United States Code
28 U. S. C. § 1254(1) 1
28 U. S. C. § 1257(2) 1, 2, 3
28 U. S. C. §§ 1331, 1343 4
28 U. S. C. §§ 2281, 2284 4
Illinois Revised Statutes (1969)
Chapter 38 Sections 106-1 et seq. 8
Chapter 110-A Section 51(e) 8
Constitution of Illinois
Article IV, Section 4 3

Books.

Story's Commentaries on the Constitution, pp. 287-288 (Brown Shattuck, abridged ed., 1833) 12

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO OPPOSITION BRIEF.

JURISDICTIONAL STATEMENT.

Res judicata is now asserted as somehow affecting this Court's jurisdiction under 28 U. S. C. § 1254(1). The defense was not asserted below!

Re Napolitano, 401 U. S. 951,[1] was an *ex parte* appeal from respondents' July 14, 1970 order forfeiting petitioner's office. In his "Motion of the Appellee to Dismiss or Affirm"[2] the § 1257(2) appeal, the Illinois Attorney General asserted:

> An issue which appellant raises tangentially concerns . . . consideration by the Courts Commission of Judge Napolitano's invocation of the 5th Amendment privilege against compulsory self-incrimination before the Sangamon County Grand Jury and the contents of his

1. Docketed in this Court December 22, 1970 as No. 70-1151.
2. Page 30 of motion to dismiss—docket No. 70-1151.

grand jury testimony following a grant of immunity to him. These issues are not proper subjects upon which to invoke the Court's appellate jurisdiction as they do not draw into question the validity of any state statute on federal constitutional grounds.

Specifically, the material question in the § 1257(2) appeal was: "Is Section 18, Article VI of the Illinois Constitution and Illinois Supreme Court Rule 51, void for vagueness and impermissibly overbroad under the Fourteenth Amendment?" [p. 8, Jurisdictional Statement; Questions Presented (No. 70-1151)].

When this action was instituted a three-judge district court was convoked under 28 U. S. C. §§ 2281, 2284 to consider the same question concerning validity of the Illinois Constitution and Court Rule 51. [*Napolitano* v. *Ward*, 317 F. Supp. 79, 80.] On July 31, 1970, the three-judge court ruled that the 28 U. S. C. § 2281 challenge "is without merit, i.e., that it does not raise a substantial constitutional question" and "terminat(ed) the three-judge panel and . . . remand(ed) the matter to the . . . district judge before whom the matter was originally filed, for determination of the remaining issues raised by Napolitano's complaint." [317 F. Supp. at 82.]

The single-judge court declared that "the remaining issues" are: (1) "that (petitioner's) removal violated the Fifth Amendment because it was based . . . on the fact that he invoked the privilege against self-incrimination when called to testify before a . . . grand jury" [317 F. Supp. at 84 (Pet. App. 10)] and (2) "that reliance upon (petitioner's) testimony as establishing (impropriety or the appearance of impropriety) . . . violated his privilege against self-incrimination." [317 F. Supp. at 85 (Pet. App. 11).]

Both opinions were appended to our Jurisdictional Statement [*Re Napolitano*, No. 70-1151].

The termination of the §§ 2281, 2284 court rested upon its declaration that the words "for cause" do "not mean removal by arbitrary or capricious action" and that "the cause must be one in which the law and sound public policy will recognize as a cause for his no longer occupying the office." [317 F. Supp. at 81.] Petitioner accepted this as the constitutional standard to be applied by the Seventh Circuit—a standard which would have led to the determination that the only cause under "the law and sound public policy" of Illinois was criminal conviction, i.e.: "after the presumption of (petitioner's) innocence (had been) dispelled by conviction of an infamous crime in a trial court."[3]

Thus, when the Court dismissed petitioner's § 1257(2) appeal the judgment constituted nothing more than indirect approval of the Illinois "statutes" as construed by the three-judge district court below.

Re Napolitano, 401 U. S. 951 (3/8/71), was without benefit of opinion or findings below. The order and judgment of forfeiture is vague, overbroad, ambiguous and duplicitous. Mr. Justice Brennan's observations in *McGautha* v. *California,* 402 U. S. 183, 270 [dissenting opinion] are relevant: "[D]ue process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary actions may be reviewed or corrected." "[W]here federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights."

---

3. *People ex rel. Keenan* v. *McGuane,* 13 Ill. 2d at 537, quoted at p. 13, n. 7 of the Petition and section 4 of article IV of the Illinois Constitution, quoted at p. 3 of the Petition.

It was this claim that led the Seventh Circuit to declare that petitioner "has admitted the validity of the 'for cause' standard of removal" [Pet. App. 7] and its conclusion: "We feel the framers of the Canons (of Judicial Ethics) were of the view that separation of the behavior of a judge while off the bench from his conduct in the courtroom is impossible." [Pet. App. 8.]

Petitioner exhausted every means known, to preserve and protect his federally secured rights. Indeed, his very first pleading in the disciplinary proceedings was: "Respondent's Reservation of Rights under 42 U. S. C. §§ 1981, et seq., and 28 U. S. C. §§ 1331 and 1343." [R. (1)19.][4] It stated the principles declared by *Government Employees* v. *Windsor*, 353 U. S. 364, and *England* v. *Louisiana Medical Examiners*, 375 U. S. 411, 419-421, and concluded:

> 375 U. S. pages 420-421, specifies how the waiver is to be avoided.
>
> > 'A party may forestall any (such) conclusion . . . by making on the . . . record the reservation to the disposition of the entire case by the state courts . . . that is he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor* (*Government Employees* v. *Windsor*, 353 U. S. 364) and that he intends, should the state courts hold against him . . . to return to the District Court for disposition of his federal contentions.'
>
> This case presents substantial threshold questions of state law which should be determined in the first instance by the State's judicial forums. Also involved are substantial questions of federal constitutional rights. Exposition of the federal claims is appropriate with regard to consequences which will result, depending on the construction given to relevant state laws. Accordingly, we hereby reserve our federal jurisdictional rights in the manner prescribed by *England* v. *Louisiana Medical Examiners*, 375 U. S. 411, 519-420.

Purely and simply, petitioner was brought to discipline because he "invoked his constitutional privilege against

4. References to the record are by R(1) and R(2) followed by page numbering. R(1) consists of pleadings, motions, etc. R(2) consists of report of disciplinary proceedings—7/7/70 through 7/14/70. The entire disciplinary record is part of the record below. The Attorney General is familiar with these references and followed it in *Re Napolitano*, No. 70-1151—"Motion of the Appellee to Dismiss".

self-incrimination . . . concerning the Illinois State Fair." [Disciplinary Complaint, par. 2; p. 7 of Petition.] His office was taken because of the foregoing "conduct concerning certain concession contracts with the Illinois State Fair." [Commission Order, par 3.] Ever since, respondents have asserted these overbroad ambiguities[5] and have thereby "rendered inefficacious the federal judicial machinery . . . established for the vindication of those rights." [p. 4, *ante*.] At page 3, note 2, of the opposition brief respondents say: "Prior to 1961, the appellant[6] held more than forty-two contracts for concession stands (Tr. 24)"[7] and by this imply "impropriety" rather than "appearance of impropriety" as the cause for forfeiture.

In so doing they raise issues concerning use and derivative use immunity, having constitutional impact of threshold importance. Given the substance of the criminal penalty inflicted, the appearance of criminality as the offense charged and respondents' use and manner of use, of petitioner's forced testimony; the decisions below also conflict with *Boyd* v. *United States*, 116 U. S. 616; *United States* v. *United States Coin & Currency*, 401 U. S. 715; *Kastigar* v.

5. As this Court stated in substance in *Speiser* v. *Randall*, 357 U. S. 513, 526: "How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative"; particularly when "the generality of the standard applied provides but shifting sands on which the litigant must maintain his position."

6. The brief in opposition is essentially a republication of Brief and Argument for Defendants-Appellees in the Seventh Circuit and is reflected by the opinion below.

7. "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." [*Slochower* v. *Board of Ed. of N. Y.*, 350 U. S. at 558.]

United States, 406 U. S. 441; and *Zicarelli* v. *New Jersey Investigating Commission,* 406 U. S. 472.

It is inconceivable that this Court—under the guise of a summary dismissal "for want of a substantial federal question"—would set aside the constitutional principles and decisions in: *Bond* v. *Floyd,* 385 U. S. 116; *Boyd* v. *United States,* 116 U. S. 616; *Malloy* v. *Hogan,* 378 U. S. 1; *Gardner* v. *Broderick,* 392 U. S. 273; *Bouie* v. *Columbia,* 378 U. S. 347; *Giaccio* v. *Pennsylvania,* 382 U. S. 339; *Slochower* v. *Board of Education of N. Y.,* 350 U. S. 551; *United States* v. *United States Coin & Currency,* 401 U. S. 715; *Kastigar* v. *United States,* 406 U. S. 441; and *Zicarelli* v. *New Jersey Investigating Commission,* 406 U. S. 472.

THE QUESTIONS PRESENTED REMAIN THE SAME.

The petition for writ of certiorari presents the case as it is! The disciplinary complaint charges and thus violates petitioner's rights under the Fifth and Fourteenth Amendments in that it is based "on the fact that he invoked the privilege against self-incrimination when called to testify before a Sangamon County Grand Jury." [317 F. Supp. at 84 (Pet. App. 10); see also: par. 2, p. 7 of the Petition.]

Respondents have viewed the question as resting upon the constitutionally required scope of immunity and the opinion of the Court of Appeals states and decides the issue on that basis.

From the relevant constitutional standpoint, the Self-Incrimination and Due Process questions are essentially the same under either point of view. And thus, the "Questions Presented" at pages 2 and 3 of the petition are likewise decisive of the immunity considerations.

SUPPLEMENTAL STATEMENT IN REPLY TO RESPONDENTS' BRIEF.

The case, as stated by the Court of Appeals, does not support the decision reached and corrected logic, inevitably leads to added reasons of substance for granting the writ. In sum, the following facts were found by the Seventh Circuit.

The petitioner was duly elected a Circuit Judge of Cook County in November 1968 and was removed "for cause" on July 14, 1970. [457 F. 2d at 28 (Pet. App. 1).]

He was called as a witness by a grand jury investigating the administration and management of the Illinois State Fair and on the advice of his attorney he refused to answer questions as to business dealings with the State Fair Agency on the claim of the federal privilege against self-incrimination. Thereafter, he was granted statutory immunity[8] from prosecution and compelled to testify. The content of his testimony "related to the procedures whereby (he) secured 42 contracts for concession spaces at the State Fairs for each year . . . 1961 to 1969." [457 F. 2d at 281 (Pet. App. 2-3).]

Immediately after his testimony the petitioner "was named as an unindicted co-conspirator resulting from his dealings with State Fair concession contracts." [457 F. 2d at 283 (Pet. App. 6).]

On February 5, 1970, the respondents invoked their disciplinary power and the petitioner was relieved of all assignments. [457 F. 2d at 282 (Pet. App. 3).]

On March 19, 1970 the formal disciplinary complaint [p. 7 of the Petition] was filed and charged the petitioner with impropriety and the appearance of impropriety in

8. Ill. Rev. Stat. 1969, chap. 38 §§ 106 et seq.; quoted at p. 7, n. 4, Resp. Brief.

violation of Canon 4 of the Canons of Judicial Ethics. [457 F. 2d at 282 (Pet. App. 3).]

"Beginning on July 7, 1970 a formal hearing was had" and "the transcript of (petitioner's) testimony before the grand jury was considered." [457 F. 2d at 282 (Pet. App. 3).] In addition to what the opinion states it is also undeniable that the following procedural rules were explicitly held to apply:

> (1) The Attorney General had the burden of proving the allegations of the complaint by clear and convincing evidence. [Ill. Rev. Stat., Chap. 110A § 51(e).]
>
> (2) The petitioner could not be compelled to give any evidence and his failure to testify could not be considered in any respect. [R. 2, 90, 91, 97.]

"On July 14, 1970 the Courts Commission found" that petitioner's conduct constituted "impropriety" or the "appearance of impropriety" and "cause within the meaning of section 18, article IV of the Illinois Constitution warranting his removal from office." [457 F. 2d at 282 (Pet. App. 3).]

Based on the foregoing, the Court of Appeals held that impropriety and the appearance of impropriety, within the meaning of Canon 4 of the Canons of Judicial Ethics may be established "from the use of (petitioner's) testimony before a grand jury compelled by a grant of full transactional immunity." [457 F. 2d at 281 (Pet. App. 4-5).] The opinion reasons: (1) the constitutionally required scope of immunity must be equivalent "to the traditional declarations of amnesty" and "protect a witness from future prosecution." [*Reina* v. *United States*, 364 U. S. 507, 574; quoted at 457 F. 2d at 283 (Pet. App. 6)]; (2) immediately after petitioner's testimony State Fair officials were indicted and he was charged as a non-indicted conspirator "but he never was or has been subjected to criminal prose-

cution for 'any transaction, matter or thing' arising from the immunized testimony" [457 F. 2d at 284 (Pet. App. 6-7)]; therefore, (3) "the transactional immunity granted (petitioner) by the State of Illinois was co-extensive with his Fifth Amendment privilege against self-incrimination" and the "procedures by which (he) was removed from the office of Circuit Court Judge of Cook County, Illinois, are in accord with the requirements of the Fifth Amendment" [457 F. 2d at 284 (Pet. App. 7 and 8)].

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT.

Given the substance of the criminal nature of penalty inflicted and in light of the principles declared in *Kastigar* v. *United States*, 406 U. S. 441, and *Zicarelli* v. *New Jersey Investigating Comm.*, 406 U. S. 472; the basis for respondents' opposition brief and the decision below raise threshold questions of substance concerning the practical impact of the use and derivative use immunity holdings in *Kastigar* and *Zicarelli, supra.*

On Its Face, the Opinion and Judgment of the Seventh Circuit Overrules Boyd v. United States, 116 U. S. 616, and Conflicts with This Court's Decisions Resting Thereon.

Boyd v. *United States*, 116 U. S. at 634, a civil forfeiture proceeding held that the sole concern of the privilege against self-incrimination "is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' "[9] *United States* v. *U. S. Coin & Currency*, 401 U. S. 715, 718—also a civil

9. As stated in *Kastigar* v. *United States*, ... U. S. ...., 40 U. S. L. W. at 4554, quoting *Ullman* v. *United States*, 350 U. S. 422, 438-439, quoting *Boyd* v. *United States*, 116 U. S. at 634.

forfeiture proceeding—holds that "as *Boyd* v. *United States* . . . makes clear, 'proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offenses committed by him* (emphasis is the Court's), though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes. . . . [L]iability is predicated upon a finding of . . . wrongful conduct; in both cases, the Fifth Amendment applies with equal force."

Without resorting to the undenied record for material facts omitted from respondent's brief and the opinion below, the opinion below, on its own findings, are insufficient to support the constitutional judgment reached. In sum:

1. Petitioner's office was taken because of the same conduct alleged in criminal indictments naming him as the non-indicted conspirator and constitutes precisely the same penalty as would have attached had he been indicted, prosecuted and convicted of the offense constituted by the same course of conduct.

2. The finding below and respondent's reason for denying the writ are bottomed on the conduct shown by the indictments and established by the use of the transcript forced by the grant of immunity preventing his indictment.

3. Thus, the disciplinary action was instituted to forfeit petitioner's office by reason of the offense immune from criminal prosecution and the use of his forced testimony led to the infliction of the criminal penalty affixed to the criminal acts or alleged in the conspiracy indictments.

In *esse,* the complex of values embraced within the privilege against self-incrimination [see: *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52] emerge to support our pref-

erence for the accusatorial rather than an inquisitorial system." [378 U. S. at 55.] And in terms of the individual, Justice Harlan declared: "The accusatorial rather than inquisitorial system is a fundamental part of the 'liberty' guaranteed by the Fourteenth Amendment." [*Griffen* v. *California,* 380 U. S. 609, 616.]

Plenary consideration will run right to the heart of the command that "no person shall . . . be compelled in any criminal case to be a witness against himself." [p. 3 of the Petition.] The undenied and undeniable facts are plainly clear in the record and when flushed out, will logically prove that "the privilege" does indeed "serve to protect the innocent who otherwise might be ensnared by ambiguous circumstances." [*Slochower* v. *Board of Education of N. Y.,* 350 U. S. 551, 558-559.]

The constitutional right of a person to remain silent by definition and intrinsic circumstance, constitutes implications of guilt and it would be pure euphemism to contend that the tendency is impeded by such aphorisms as: "The privilege against self-incrimination is a specific provision of which it is particularly true that 'a page of history is worth a volume of logic.' " [*Ullman* v. *United States,* 350 U. S. at 438.]

1. The legal standard here applied is the appearance of criminality.

2. It was charged and established by petitioner's choice not to incriminate himself followed by extrinsic circumstances summing up to the fact that Illinois responds to the federal right against self-incrimination by compelling a witness to testify in exchange for its promise not to prosecute criminally.

3. Petitioner was thus forced to testify *a fortiori,* named as a non-indicted conspirator.

4. In Illinois, the forfeiture of eligibility for public office under the unofficial factors involved here is precluded until "after the presumption of his innocence is dispelled by conviction of an infamous crime in a trial court." [*People ex rel. Keenan* v. *McGuane*, quoted in relevant part at p. 13, n. 7 of the Petition.]

5. At the time the penalty affixed to the appearance of criminality the conduct being penalized had been adjudicated as criminally innocent by the court of criminal jurisdiction.[10]

Thus, if it be the constitutional purpose, as the constitutional purpose it is, that the privilege and the immunity are to "serve to protect the innocent who otherwise might be ensnared by ambiguous circumstances" [supra, 350 U. S. at 558-559] then this case deserves plenary review and a thorough diagnosis of the elements so grossly ambiguous that a totally innocent man is inflicted with the awesome punishment of criminal infamy by use of a specific constitutional provision whose sole concern is to protect the individual against such arbitrary, cruel and unusual punishment—even when it is senselessly inflicted in the high name of ethics.

The reasons for granting the writ are as broadly substantial as the Constitution itself. A simplistic test is as conclusive as the others. *Murphy* v. *Waterfront Commission*, 378 U. S. at 79 declares that the constitutionally required scope of immunity must leave the State and the witness "in substantially the same position as if the witness had

10. Respondents assert "this statement is totally untrue" and thereby imply that criminal charges legally insufficient on their face would be adjudged as a crime were the defendant Judge Napolitano. This "is so incompatible with the genesis of our institutions that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice." [Story's Commentaries on the Constitution, pp. 287-288 (Brown Shattuck, abridged ed., 1833).]

claimed his privilege in absence of a state grant of immunity."[11]

The Courts Commission explicitly ruled that the petitioner could not be compelled to give evidence in the disciplinary proceeding. [8, *ante.*] Thus, the transcript of testimony which had been forced in the prior grand jury investigation did not leave petitioner "in substantially the same position" as he would have enjoyed under the constitutional right of a person to remain silent. Respondents' reason for denying the writ [Resp. Br. 6] and the principle issue [Pet. App. 4-5], decided by the Seventh Circuit cannot be constitutionally sustained and the writ should be granted.

In light of respondents' reliance on criminally innocent impropriety, with regard to petitioner's State Fair dealings, as the reason why the writ should be denied we respectfully request the Court to re-examine part I C-Reasons for granting the writ, [pp. 14-17, of the Petition]. And thus supported, the opinions and judgments below contradict *Giaccio* v. *Pennsylvania,* 382 U. S. 339; *Bouie* v. *Columbia,* 378 U. S. 347.

11. Quoted with approval *Kastigar* v. *United States,* 401 U. S. 441 [32 L. Ed. at 224].

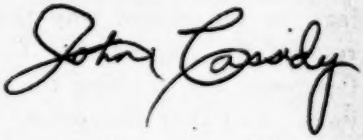
CONCLUSION.

For each and every reason embraced within the petition for writ of certiorari, for the reasons herein suggested and for those intrinsic to notions of justice; a writ of centiorari should issue and after plenary consideration, the Court should vindicate the Constitution of the United States and the human dignity thereby secured to the petitioner.

Respectfully submitted

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602
Attorney for Petitioner,

November 9, 1972.



FILE COPY

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

THE DUNHOOD-HARDIN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

No. 71-1648.

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

The petitioner respectfully moves for leave to file the Petition for Rehearing which was three (3) hours out-of-time and has been lodged in the Clerk's office since 3:00 a.m. (E.S.T.), December 30, 1972, pending decision on this motion.

I.

The order denying certiorari was entered on December 4, 1972[1] and under *Rule 58(2)*, a petition for rehearing was due on December 29, 1972. Forty (40) printed copies of the petition together with the printer's proof of service were delivered by the undersigned to United Air Lines,

1. At page 1 of the petition for rehearing the date of the order appears as December 4, 1971. This is a typographical error.

O'Hare Terminal Building, Chicago, Illinois and should have been delivered, via Flight No. 278 and United's flight crew and livery service, to the Court Building before 11:00 p.m. (E.S.T.), on the due date. Flight 278 is a scheduled flight from Chicago (O'Hare) to Washington, D. C. (National). It departs Chicago at 7:30 p.m. (C.S.T.) and arrives in Washington at 10 p.m. (E.S.T.). [U. A. L. Schedules (eff. 12/14/72) p. 20.] On December 29, 1972, weather, atmospheric and other flight conditions delayed the flight and it arrived at Dulles International Airport at 1:00 a.m. (E.S.T.), December 30. Flight 278 was used because it was recommended by air line officials.

The nature of the case and the matters presented by the petition are such that preparation was inhibited by caution. Certiorari procedures do not readily lend themselves to proving that a record is neither cloudy nor opaque. The analysis-by-juxtaposition [Pet. for Rehrg., 7-11] is the product of trial and error. In short, the undersigned candidly admits that he could not prepare the rehearing papers, such as they are, in less time than was taken. In all events, we disclaim dilatory neglect as a cause for delay.

II.

Rule 58(2) rests upon the principle that litigation must end. [*United States* v. *Ohio Power Co.*, 353 U. S. 93.] The facts and circumstances of the case have no relevant impact on the reason for the rule. Delay is not a factor and the petition for rehearing was physically present in the Clerk's office the same as if it had been received between 5:05 p.m. and 11:55 p.m. (E.S.T.) on December 29, 1972.

On the other hand, the request for reconsideration rests on claims which support independent actions under 28

U. S. C. § 1651(a)[2] and *Rule 60(b)(3), Federal Rules of Civil Procedure.*[3]

Moreover, in present posture, the case appears to support a new and independent claim under 42 U. S. C. §§ 1983, 1985 and 28 U. S. C. §§ 1331(a), 1343(1), (2), (3) and (4). [See *e.g.*: *Monroe* v. *Pape,* 365 U. S. 167; *Adickes* v. *Kress & Co.,* 398 U. S. 144; *Bivens* v. *Six Unknown Federal Agents,* 403 U. S. 388; *Griffin* v. *Breckenridge,* 403 U. S. 88.] It has long been the rule that there is actionable fraud "where by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case." [*United States* v. *Throckmorton,* 98 U. S. 61.] And just last term, the Court declared that "the right of access to the courts is indeed but one aspect of the right of petition" and concluded that once it is established that there has been abuse of the judicial process that has "produced an illegal result, viz, effectively barring (litigants) from access to the agencies and courts" then "actions of that kind cannot acquire immunity . . ." [*California Transport* v. *Trucking Unlimited,* 404 U. S. 508 (30 L. Ed. 2d at 648).]

III.

The opinion of the court of appeals principally decides that "the conduct for which (petitioner) was removed from office may be established by (respondents) from the use of

2. § 1651. *Writs.*

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

3. (b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

his testimony before a Grand Jury compelled by a grant of full transactional immunity.'"[4] [Pet. App., 4-5.] There is no specification of the conduct constituting the appearance of impropriety.

Two questions are presented by the petition for certiorari [pp. 2-3]. They are:

1.

> Does Petitioner's removal, as a Circuit Judge of Cook County, Illinois, because he refused to waive his right against self-incrimination, when called to testify before a Grand Jury investigating his personal behavior, violate his rights under the Self-Incrimination and Due Process Clauses of the Fifth and Fourteenth Amendments?

2.

> Where the punishment is a penalty prescribed for criminal conviction, and 'appearance of impropriety' constitutes the standard applied to criminally innocent personal conduct and to the refusal to waive the constitutional right against self-incrimination before a grand jury: Is the proceeding and the forfeiture of Petitioner's State judicial office repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

If the petitioner had waived his right against self-incrimination and testified he would have been indicted. Had that been the case the standard for removing him from office would have been criminal conviction as prescribed by section 4 of Article IV of the Illinois Constitution. [See:

---

4. The statement "use of his testimony . . . compelled by . . . transactional immunity" signals *real* versus the *unreal* but intended meaning. The nature of the immunity forcing the testimony is irrelevant to evidentiary use to prove the fact of the matters stated therein. But the use of testimony "compelled by . . . *full transactional immunity*" [emphasis added] is relevant to establish that petitioner would have been indicted but for his refusal to waive his federal right against self-incrimination.

People ex rel. Keenan v. *McGuane*, 13 Ill. 2d 520, 537, 150 N. E. 2d 168.] And in those circumstances, his acquittal when the indictments were held not to state the crime charged, would have precluded the forfeiture of his office.

But the petitioner was merely named as a non-indicted co-conspirator because he was compelled to testify under Illinois, full transactional immunity statute.

Thus, whatever the case concerning the use of the compelled testimony and whatever the cause it implies are really irrelevant. The critical and the decisive fact remains —the petitioner was removed from office simply "because he refused to waive his right against self-incrimination when called to testify before a Grand Jury investigating his personal behavior." [Questions Presented, No. 1, Pet. for Cert. 2]

As is shown on pages 7-11 of the petition for rehearing; this is the case and neither judicial omission nor adversary misstatement can change it!

The overbroad statement of issue by the Seventh Circuit is, hence narrowed, to whether petitioner's claim against self-incrimination was conduct constituting the appearance of impropriety because the use of his testimony, in tandem with the Illinois immunity statute, established that he would have been indicted had he agreed to incriminate himself.

The respondents did not file a brief in opposition and on September 19, 1972, the Clerk of this Court addressed a letter to them and stated: "The Court has directed that a response be filed in this case." [Copy of letter appended hereto.]

The respondents then misrepresented that the documentary exhibits had been considered as evidence of their content and rested upon the irrelevant and immaterial assertion that "Neither the Fifth nor the Fourteenth

Amendment prohibits the use of testimony given pursuant to a grant of full transactional immunity in a subsequent civil proceeding instituted to remove the immunized witness from office of state court judge." [Br. in Opp., 6.]

IV.

From out here, the fact that the Court requested a response has meaning! The Court's certiorari jurisdiction is completely discretionary. "Writs of certiorari are matters of grace". [*Wade* v. *Mayo*, 334 U. S. 672, 680]. And the denial thereof "simply means that fewer than four members of the Court deemed it desirable to review a decision of a lower court as a matter 'of sound judicial discretion'." [*Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 918.]

Patently, the opinion of the court of appeals is vaguely ambiguous. But so is the appearance of impropriety or criminality standard! If the transcript of testimony "compelled by a grant of full transactional immunity" was used, *as it was used*, to explain why the petitioner was merely a non-indicted conspirator, it established circumstances surrounding his claim against self-incrimination and thus conduct leading to the appearance of criminality. If, on the other hand, the transcript was used, *as it was NOT used*, as evidence proving the fact of the matters therein, it could be construed as establishing some unspecified conduct constituting impropriety.

The "request for a response" indicates, at least, that the case and the questions presented by the petition for certiorari deserved plenary consideration. The brief in opposition exploited the ambiguities below. It clearly appears that the order denying certiorari, therefore, rests upon extrinsic misrepresentation, whether it be: (1) That "a case may raise an important question but the record may be cloudy" [*Maryland* v. *Baltimore Radio Show*,

supra]; or (2) That "the Supreme Court would be likely not to reach the point of alleged importance or conflict." [Stern & Gressman, *Supreme Court Practice* (4th ed. 1969) p. 315].

Request for rehearing is primarily predicated on the claim that the court below "has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court[5] as to call for an exercise of this Court's power of supervision." [*Rule 19(b), Rules of the Supreme Court of the United States*]. Pages 7-11 of the petition for rehearing suggests that the overbroad ambiguities below may not be judicial oversight.

V.

It has been with all respect that we have proceeded in the State and Federal tribunals involved in this case. And it has been indeed humbling to know that those using the overbroad and duplicitous devices against us may have enjoyed our apparent naivete. We have not made vituperative counterattack or responded in kind. We have eschewed making charges concerning motive because the case and questions presented are of far reaching constitutional importance. Furthermore, we did not wish to make a hard case harder. Our system, we thought, is sufficiently self-executing that a present-day Emile Zola would have no contemporary standing or relevance.

---

5. Typical of the effort to imply findings where there are none is the District Court's declaration that petitioner "is arguing that he has a federal right to remain as a judge regardless of his conduct" followed by "there is no constitutional right to public office (citation) and '(t)here is no devine right of judges to flout the law.' *Jenkins* v. *Oregon State Bar* . . ." [Pet. App. 12]. A finding or conclusion in an Oregon case is not fact here. Whatever may have been the "divine right" claim in the cited case is immaterial—this claim is that there is a constitutional right of judges to claim the right of a person to remain silent and not "flout the law".

Our singular aim has been and is an authoritative declaration on the two issues presented by the petition for certiorari. Petitioner's refusal to resign under the coercion and cajolery employed and the consequences of the "expurgatory ritual" have been wasted unless this controversy leads to candid adjudication that will preclude its repeat for another two hundred (200) years.

The case and the questions presented stand on their own merits. On the other hand, new litigation under the theories suggested *ante* 2 & 3, could only detract from the institutional integrity which has led to what Gerald Dickler has so aptly described as "the ritual . . . of expurgation—to rid the body politic of an irritant, an alien substance, or a poison."[6]

The petition for rehearing is out-of-time because of circumstance. The petitioner's problem also stems from fortuity. Unless this motion is allowed petitioner will remain the victim of a totality of circumstances that will do far more than destroy him. Our national commitment to "Equal Justice Under Law" is more than bill-board rhetoric heralding the annual approach of LAW DAY, U. S. A.

CONCLUSION.

For these reasons, the motion and the petition for rehearing should be allowed.

Respectfully submitted,

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

---

6. Dickler, MAN ON TRIAL. Quote is from author's preface quoted at length at page 22 of the petition for certiorari.

APPENDIX.

September 19, 1972

The Honorable William J. Scott
Attorney General of Illinois
160 N. LaSalle Street
Chicago, Illinois

Re: Richard A. Napolitano v. Daniel P. Ward, Justice of the Illinois Supreme Court, et al., No. 71-1648

Dear Sir:

On June 19, 1972, John E. Cassidy, Jr., Esq., filed on behalf of Mr. Richard A. Napolitano a petition for a writ of certiorari in this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit (No. 71-1444), dated March 21, 1972. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Forty printed copies of the response, together with proof of service thereof, should reach this office on or before October 19, 1972.

Very truly yours,

MICHAEL RODAK, JR.,
Clerk.

cc: John E. Cassidy, Jr., Esq.
800 Lehmann Building
Peoria, Illinois 61602

E COPY

Supreme Court, U.
FILED
DEC 30 197
MICHAEL ROD
J., JR.,

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,
Petitioner,

vs.

DANIEL P. WARD, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

December 29, 1972.

THE DUNHOOP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Introductory Statement	1
I. Rehearing should be granted when respondents misrepresent the case in a response which was filed at the request of the Supreme Court of the United States	5
II. The overbroad and ambiguous language in the opinion below constitutes, under present circumstance, such a departure from federal appellate procedure as to call for exercise of supervisory power by the Supreme Court of the United States	11
III. Appearance of impropriety, impropriety, personal behavior beyond reproach and good behavior require that this Court authoritatively adjudicate and destroy them as standards by which judges from judicial office	12
Conclusion	
Appendix:	
Order of Illinois Courts Commission—dated July 14, 1970	A1

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,

Petitioner,

vs.

DANIEL P. WARD, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

Now comes the petitioner and respectfully moves for an order: (1) vacating the denial of the petition for certiorari entered on December 4, 1971; (2) granting certiorari; or (3) issuing a rule to show cause why certiorari should not be granted and directing briefs and oral argument thereon.[1]

The petition for writ of certiorari was filed on June 19, 1972 and on September 19, 1972 the Clerk addressed a letter to the Attorney General of Illinois stating, *inter alia:*

1. See e.g.: *United States* v. *Thomas,* 361 U. S. 950, 951; *Aaron* v. *Cooper,* 358 U. S. 27-28; *Adkins* v. *DuPont Co.,* 335 U. S. 331; *In re Yamaskita,* 327 U. S. 1.

> The Court has directed this office to request that a response be filed in this case. Forty printed copies of the response, together with proof of service thereof, should reach this office on or before October 19, 1972.

Messrs. Stern & Gressman, SUPREME COURT PRACTICE (4th ed., 1969) at page 317, state:

> If no opposing brief or waiver thereof is filed by the respondent the Court ordinarily will take action on the basis of the petition alone shortly after expiration of the time for filing such a response. But in exceptional situations, the Court may request a response to the petition even though the time for filing has elapsed and will defer action on the case until the respondent has made known his views. Such a request may also be made where the situation is not particularly exceptional but where the Court may deem it appropriate to hear from the respondent before acting upon a petition that is *prima facie* meritorious.

Rule 24(1), Rules of the Supreme Court of the United States prescribes that the response should disclose "any matter or ground why the cause should not be reviewed by this Court"; and Stern & Gressman [Id., p. 315] say that it should "point out that the presence of other meritorious arguments . . . shows that the decision below is correct without regard for the question sought to be raised by the petition and that as a result the Supreme Court would be likely not to reach the point of alleged importance or conflict."

Respondents' Brief in Opposition is not a response to the petition for writ of certiorari. They do not deny the statement of the case—they ignore it. They simply exploit the overbroad ambiguities of the opinion below and pervasively misrepresent the "conduct for which appellant (petitioner) was removed from office" as "established by the Courts Commission from the use of his testimony before a Grand Jury compelled by a grant of full transactional immunity." [457 F. 2d 279, 280 (Pet. App. 4-5.)]

The thing we most cannot understand is the extremes to which so many have gone to deny the petitioner fair and disinterested adjudication. During the course of such "adjudicatory" hearings as we have had, everyone has quite candidly conceded that the claim of constitutional privilege was the conduct constituting the appearance of impropriety and cause for removal. Yet, the ensuing opinions seem to go far too far to hide that fact.[2] Our question is why?— A question which in and of itself may require this Court's attention far more than the many others.

The petition for writ of certiorari states the case as "established by the Courts Commission" [Pet. App., 4-5. Also, Pet. for Cert., 4-8]. It concretely presents the questions whether: (1) a judge enjoys the benefits under the constitutional command that "no person shall . . . be compelled in any criminal case to be a witness against himself" and; (2) a criminal penalty, as defined by the surrounding incriminating circumstances, may be inflicted for mere appearance of criminality—particularly when the record proves that self-incrimination and indictment would have been adjudicated in favor of petitioner's acquittal. [*Questions Presented;* Pet. For Cert., 2 and 3.].

Respondents' brief in opposition misstates the case as if the appearance of criminality had, in fact, been established as criminal impropriety. At pages 3, 13-14 of the brief in opposition respondents make unwarranted, unfair and defamatory characterizations with reference to the transcript of petitioner's grand jury testimony.[3]

---

2. During oral argument in the Court of Appeals Circuit Judge Stevens flushed the admission from the Attorney General that a judge "taking the Fifth" violates the Appearance of Impropriety Clause. The colloquy was vividly fixed in mind when Senior Judge Duffy asked the Attorney General whether he would be subject to disciplinary removal if he wore a red sock and a green sock. The opinion indicates that the shadow and not the substance—the label and not the thing is what is involved.

3 We honestly don't know what offense is implied by the innuendo. Some 19 or 20 witnesses appeared before the grand jury. Petitioners' testimony is isolated to its own context in the tran-

Without analytical finding or critical definition the Seventh Circuit declared its own "principal issue" and decided that "the conduct for which appellant (petitioner) was removed from office may be established by the Courts Com-

---

script. Though the transcript was not considered as proof of its content respondents clearly misrepresent this fact. If it were, the ultimate fact-finder would have been the grand jury and not the Courts Commission. The indictments failed to state the crime charged. Thus, if the content of petitioner's testimony is to be considered at all, then the following colloquy at the conclusion thereof is all that is relevant (Ptf. Ex. 4, Tr., pp. 79 and 81):

FOREMAN: Could you explain to the Grand Jury why you've taken immunity, you being a judge, during this investigation? Could you explain that to us?

THE WITNESS: Certainly. On the advice of my attorney, Mr. Foreman.

FOREMAN: Could you tell us what that advice was, the reason for it?

THE WITNESS: He just advised me to exercise my right and privilege under the Fifth Amendment.

FOREMAN: You don't have—

THE WITNESS: And I abide by my attorney's advice.

FOREMAN: You don't have nothing to hide or anything?

THE WITNESS: I've told you everything that there is.

FOREMAN: Well, why would you have to tell that under immunity?

• • • • •

THE WITNESS: Mr. Foreman, the layman's picture of a person exercising his right and privilege under the Fifth Amendment is very often misconstrued. And I say this without being critical. I think you are a fair-minded person. But the first inclination of someone exercising his rights is that he's hiding or he's guilty of a wrongdoing.

FOREMAN: Well, that's mine.

THE WITNESS: And that is a misconception, and I think the State's Attorney would verify that statement, and I think it's an accurate statement. It's a privilege and it's a guarantee by the Constitution. It does not in any way infer that a man who exercises his right is guilty.

FOREMAN: Thank you, sir.

MR. HOLLIS (State's Attorney): Any other questions?

That was on January 29, 1970! Only this Court can now revitalize the Constitutional faith and conviction then demonstrated by the Witness.

mission from the use of his testimony before a grand jury compelled by a grant of full transactional immunity." [Pet. App., 4-5.]

The parties have stipulated that the evidence and the ultimate facts are not in dispute. [Motion under *Rule 30(f), Federal Rules of Appellate Procedure* (7th Cir.).] The record is neither opaque nor factually contradictory. Opaqueness, confusion and contradiction have been generated by the respondents' under the guise of the overbroad language of the opinion below.

It seems that judicial ambiguity and adversary misstatement have defeated the aim of this Court when it requested "that a response be filed in this case". [*Ante*, pp. 1-2.]

I.

WHEN THE SUPREME COURT OF THE UNITED STATES REQUESTS A RESPONSE TO THE PETITION FOR CERTIORARI AND OVERBROAD LANGUAGE IN THE OPINION BELOW PERMITS MATERIAL MISREPRESENTATION OF THE CASE PRESENTED THIS COURT SHOULD VACATE ITS DENIAL OF CERTIORARI, GRANT THE WRIT OR DEFER ACTION THEREON UNTIL AFTER PLENARY CONSIDERATION.

This Court has often dismissed writs of certiorari as improvidently granted because briefing and oral argument forced out matters not fully apprehended when certiorari was granted. The corollary of this proposition applies here. Cases, like individuals, fall within the phrase "*Esse Non Videre*".[4] And this case should be tried for what it is and not for what respondents and the courts below have made it seem to be.

The findings of the Courts Commission [*infra*, pp. 10-11] which when read together with the disciplinary complaint

4. Loosely conjugated and translated to mean—I am what I am —not what I seem.

[*infra*, 7-8] and the limited use of the documentary evidence [*infra*, pp. 9-10] clearly establish that the petitioner was removed from office because Illinois' response to the federal privilege prohibited his criminal prosecution [Ill. Rev. Stat. Chap. 38, § 106-1 et seq.] and thus; because he would have been indicted had he not claimed the constitutional right.

It is fundamental that "A decree must relate specifically and exclusively to the pleadings and proof. If not so related, the provision because of its vagueness, will jeopardize the exercise of protected freedoms." [*United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576, 581.] Moreover, the petitioner had a right, under 28 USC § 1343 and 42 USC § 1983, to have his Federal Constitutional claims heard and determined on the basis of what was, in fact," "established by the Courts Commission" [Pet. App., 4-5]. And under federal, no less than state, adjudication procedures must be used which do not hide the arbitrary infliction of punishment [Cf. *Cole* v. *Arkansas*, 333 U. S. 196; *Goldberg* v. *Kelly*, 397 U. S. 254. See also: *SEC* v. *Chenery Corp.*, 318 U. S. 80].

We are aware of and sensitive to the strict limitation of Rule 58(2), *Rules of the Supreme Court of the United States*. But abstract principle must sometimes flex to concrete cases. Under present circumstances substantial justice depends on clarification of the case. [See *e.g.*: *Hickman* v. *Taylor*, 327 U. S. 808; 328 U. S. 876; 329 U. S. 495. See also, Stern & Gressman, SUPREME COURT PRACTICE, § 15.7, p. 526 (4th ed. 1969).]

The misleading impact of the overbroad language below and the false-face of the facts mispresented by the brief in opposition are evident from the following:

Facts Presented by Appellant's Brief—7th Circuit

(Pages 14-18)[5]

I.

The disciplinary complaint alleged:

"1. That on or about September 1, 1969, the Sangamon County Grand Jury commenced an inquiry into possible wrongdoing in connection with the Illinois State Fair, which inquiry eventuated on January 30, 1970, in the filing of indictments numbers 317-70 and 320-70 alleging official misconduct in connection with the 1968 and 1969 State Fairs. These indictments allege the participation of respondent in said misconduct, though respondent is not named as a defendant therein.

2. That on or about January 29, 1970, the respondent appeared as a witness before the September Grand Jury, Sangamon County, Illinois, and in response to inquiries directed to him before said jury, the respondent invoked his constitutional privilege against self-incrimination in support of his refusal to answer questions concerning

7th Circuit Opinion Findings

(Petition Appendix, 3)

I.

"At the direction of the Supreme Court of Illinois, appellant was relieved of all assignments on February 5, 1970. On February 13, 1970, the Illinois Courts Commission designated the Attorney General of Illinois to prepare and file a complaint against the appellant. This was done on March 19, 1970, charging him with impropriety and the appearance of impropriety in violation of the Canon of Judicial Ethics."

5. The pleadings and judicial findings are taken verbatim from Appellant's Brief below.

the Illinois State Fair, and any possible wrongdoing on his part in connection therewith.

3. That respondent, accompanied by and speaking through counsel, appeared before the Honorable William H. Chamberlain, Judge of the Circuit Court of Sangamon County, on January 29, 1970, and in open court stated that he had invoked his constitutional privilege against self-incrimination in connection with the Grand Jury inquiry into the Illinois State Fair and his possible wrongdoing in connection therewith. Upon motion of the State's Attorney of Sangamon County, Richard A. Hollis, and without objection, respondent was granted immunity by the court in accord with the provisions of Article 106, Chapter 38, Illinois Revised Statutes, and *on information and belief, testified at length before the said Grand Jury thereafter.*" [Emphasis added][6]

II.

On June 12, 1970 the Circuit Court of Sangamon County dismissed the indict-

II.

No comment in opinion below.

6. The Attorney General signed the complaint. The "information and belief" allegation shows that the transcript of petitioner's testimony was not relevant to the initiation of disciplinary action and that its specific factual conduct is not embraced within the charges filed.

ments charging the petitioner as a non-indicted conspirator holding them defective in that "they do not constitute sufficient averments of facts." It further declared:

> The official misconduct Statute is not sufficiently specific so that a valid indictment for the offense of conspiracy can be drafted in the language of the Statute defining official misconduct, *People* v. *Isaacs*, 37 Ill. 2d 205."

III.

Beginning on July 7, 1970 a formal hearing was held before the Courts Commission. The following documentary evidence was admitted for limited consideration under the "Verbal Act" exception to the hearsay rule. The documentary evidence consisted of:

1. The 1/29/1970 report of proceedings before the Circuit Court of Sangamon County wherein petitioner was granted transactional immunity.

2. Indictments 317-70 and 320-70 (referred to in paragraph 1 of the foregoing disciplinary complaint)

III.

Beginning July 7, 1970, a formal hearing was had before the Illinois Courts Commission on these charges. Appellant was present and was represented by counsel. *Documentary evidence, including the transcript of appellant's testimony before the Grand Jury, was considered.* [emphasis added.]

which had been dismissed per II, *supra*.[7]

3. The transcript of appellant's testimony before the Grand Jury.

IV.

On July 14, 1970 the Courts Commission filed its judgment forfeiting petitioner's eligibility for his office and found thusly:

> "That the evidence in this case is clear and convincing that the conduct of Judge Richard A. Napolitano concerning certain concession contracts with The Illinois State Fair Agency while a member of the judiciary and the circumstances surrounding his testifying and the content of his testimony before the Sangamon County Grand Jury while a member of the judiciary, constitutes conduct unbecoming a Judge in that it violates

IV.

"On July 14, 1970, the Courts Commission found the evidence to be clear and convincing that appellant's conduct ". . . violates applicable Canons of Judicial Ethics including Canon 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office."

---

7. The Attorney General stated: "They are being offered because they are part of the historical progression of a transaction whereby Judge Napolitano was granted immunity, did testify before a Grand Jury and as a result of that testimony these indictments were returned naming him. They are part of the general series of events which led to our appearance before the Commission." [Disciplinary Hearing, 7/7/70, Tr. 34]

The Courts Commission ruled that they "are not admissible as evidence against the Respondent (petitioner). They do pertain to the factual recital of the complaint. It seems that their admission is proper." [Id, 7/7/70, Tr. 36]

applicable canons of judicial ethics including canon No. 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office.'"[8]

II.

THE OPINION BELOW SO FAR DEPARTS FROM ACCEPTED AND CASUAL JUDICIAL PROCEDURE AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Seventh Circuit has decided that the conduct for which appellant (petitioner) was removed from office may be established by the Courts Commission from the case of his testimony before a Grand Jury compelled by a grant of full transactional immunity. [Pet. App. 4-5.] The critical factors are:

1. "The conduct . . . established by the Courts Commission", and

2. "The use of his testimony . . . compelled by a grant of full transactional immunity."

Its reasoning is summed up as follows:

Immediately after his testimony, various State Fair officials were indicted for their activities concerning State Fair Commission contracts.[9] Appellant (peti-

8. The Commission Order is reproduced as Appendix A hereto.

9. The Courts Commission found, when modified by the disciplinary complaint, that petitioner's conduct [claim of the privilege against self-incrimination] concerning certain concession contract . . . [*ante*]. The court of appeals subtly shifts the meaning—"State Fair Officials were indicted . . ."

tioner) was named as an unindicted co-conspirator resulting from his dealings with State Fair Commission contracts but he never was or has been subjected to criminal prosecution for any transaction, matter or thing arising from the immunized testimony. [Pet. App. 6-7.]

A cursory differential diagnosis of the facts before the Seventh Circuit and those as stated, in its opinion demonstrates the judicial sleight-of-hand used here.

As "established by the Courts Commission", the petitioner was removed from office because he refused to waive his right against self-incrimination and the circumstances surrounding it. In short, his conduct constituting the appearance of impropriety was established because his compelled testimony established that he could not be "subjected to criminal prosecution for 'any transaction, matter or thing' arising from his immunized testimony." [*Ante*]

The destructive impact of judges judging judges under standards, which, like beauty, lies in the eye of the beholder, is suicidal. It transposes judicial duty from the verb to the noun. It is far more pervasive and prejudicial to the punitive object than was the inherent lack of "procedural safeguard" of the "Mayor's Court" in *Ward* v. *Village of Monroeville*, ____ U. S. ____, 41 U. S. L. W. 4011 (decided 11/13/72).

III.

JUDICIAL SELF-INTEREST AND CONCENTRATION OF DISCIPLINARY POWER MANDATES AUTHORITATIVE REMOVAL OF STANDARDS SUCH AS: APPEARANCE OF IMPROPRIETY, PERSONAL BEHAVIOR ABOVE REPROACH, AND TENURE DURING GOOD BEHAVIOR.

Institutional self-interest in the integrity and confidence in the judiciary is not criticism—it is commendation! But the judiciary is administered by mortals no less disposed to

those frailties supporting the division of governmental power than are those men who legislate and administrate.

The root of self-disciplinary procedures is fear of legislative impeachment powers. Judicial independence is the stated reason and public confidence is its slated governmental policy.

Irving Brant has recently chronicled the faults of Legislative Impeachment in his recent book "IMPEACHMENT—*Trials and Errors.*[10]

The State Constitutional structure, after incorporating the ethical standards of Canon 4, a squares with the impeachment and good behavior clauses of the Federal Constitution. Thus, it presents in justiciable context the historical debate concerning cause for impeachment. A debate which has repeated itself from 1797 [William Blount] through the recent abortive attempt on Mr. Justice Douglas.[11]

Canon 2 of the Canons of Judicial Ethics (ABA 1972) has been adopted since this case was docketed and provides: "a Judge should avoid impropriety and the appearance of impropriety in all his activities." This is the overbroad interpretation that the courts below have given to Canon 4. [Pet. App. 8-9.]

History proves that the vices of vagueness, overbreadth, *ex post facto* punishment and attainder inherent to political impeachments have been overcome by a division of accusatory and adjudicatory power.

The intrinsic problems cannot be removed. But what happens when the division of power is? Chief Justice John Marshall is unequalled as an advocate of the independence and supremacy of the judiciary. Marshall wrote Justice Samuel Chase during the impeachment of the latter:

---

10. Alfred A. Knopf (New York, 1972).

11. See again: Brant, IMPEACHMENT—*Trials and Errors.*

> I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than (would) a removal of the judge who has rendered them unknowing of his fault.[12]

The narrow question is whether a judge misbehaves and may be removed from office for refusing to waive his federal privilege against self-incrimination. But in essence, this constitutional exercise here is the act that leads to appearance of impropriety as the offense requiring forfeiture. Thus, the Fifth Amendment question need not be reached if the appearance of impropriety standard is intrinsically antithetical to the presumption of innocence, the reasonable doubt standard and other rudimentary due process concepts.

If "the Constitution deals with substance, not shadows", with "the thing, not the name" [*Cummings* v. *Missouri*, 4 Wall 277, 325] apparent offenses are Constitutionally impermissible. They constitute metaphysical contradictions! They are the Constitution's antecedent reason. They are a fearsome throwback to the inherent evils of the Inquisitional standards designed to erase religious and political heretics.

Thus, the fact that conduct protected under the Self-Incrimination Clause constitutes the offense merely emphasizes the unconstitutionality of the standard applied.

Victims of circumstance are inconsonant with governments of law and prohibited under the Eighth and Fourteenth Amendments. [*Robinson* v. *California*, 370 U. S. 660.]

This case does not lack substance because it is episodic. It is substantial because it is. A substantial reason why this case should be heard is because it is not very likely to present itself again in justiciable form. Judges will thus be coerced into waiver of accusatory justice or will hastily

12. Marke, *Vignettes of Legal History* (Rothman & Co., 1965) *Impeachment of Samuel Chase*—page 294.

resign rather than suffer the fearsome consequences of a public demonstration of institutional purgation.

CONCLUSION.

Implicit throughout these proceedings is, that removal from office is not an aspect of criminality and not very painful. Yet, the conduct for which he was removed was established by the incriminating circumstances surrounding his appearance before a Grand Jury. And Section 4 of Article IV of the Illinois Constitution is more circumstantially involved than the Illinois immunity statute. Circumstances, by definition, cannot be self-controlled. Thus, if petitioner's immunity, protected him from prosecution, then the forfeiture of his office is defined by Section 4 of Article IV, *supra,* as a penalty that requires that "such officer forfeit his office after the presumption of his innocence is dispelled by conviction of an infamous crime in a trial court." [*People ex rel. Keenan* v. *McGuane,* 13 Ill. 2d 520, 537; 150 N. E. 2d 168.]

In a final attempt to empathize and prove the awfulness of the penalty inflicted, the petitioner in first-person respectfully says:

I pray this Court
Oh please be fair!

For I'm a felon
Who isn't there!

And I wasn't there
Again today!

Now, but for you,
I'm here to stay!

Respectfully submitted,

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

As counsel for the petitioner, I hereby certify that thi
petition for rehearing is presented in good faith and no
for delay and is restricted to clarification as involved i
cases such as *Heckman* v. *Taylor*, 327 U. S. 808, 392 U. S
495 and *Brinkerhoff-Faris Trust Co.* v. *Hill*, 280 U. S. s
550, 281 U. S. 673 and to other grounds specified in Rul
58(2).

JOHN E. CASSIDY, JR.,
Attorney for Petitione

APPENDIX.

ILLINOIS COURTS COMMISSION

IN THE MATTER OF RICHARD A. NAPOLITANO, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, *Respondent.*	M. R. 1324

ORDER.

This matter coming on to be heard on the pleadings filed in this cause, the evidence of witnesses produced, examined and heard in open Court, the exhibits identified and received in evidence, the arguments of counsel and the authorities and The Illinois Courts Commission being now fully advised in the premises on consideration thereof finds:

1. That this commission has been duly and properly convened;

2. That it has jurisdiction of the parties and the subject matter of this proceeding;

3. That the evidence in this case is clear and convincing that the conduct of Judge Richard A. Napolitano concerning certain concession contracts with The Illinois State Fair Agency while a member of the judiciary and the circumstances surrounding his testifying and the content of his testimony before the Sangamon County Grand Jury while a member of the judiciary, constitutes conduct unbecoming a Judge in that it violates applicable canons of judicial ethics including canon No. 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office.

It is therefore ordered That Richard A. Napolitano be, and he is hereby removed from his office as a Judge of the Circuit Court (Cook County, Illinois) effective this date. Dated: July 14, 1970.

The Illinois Courts Commission.